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No. -

IN THE

Supreme Court Of The United States

October Term, 1990

JOHN GARD, *et al.*,

Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

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September 24, 1990.

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QUESTIONS PRESENTED

In a constitutional challenge to a state campaign financing regulation which prohibits a candidate from receiving more than a specific dollar amount in the aggregate from all committees, including political party committees:

a. Is the state's interest in avoiding the "potential" for corruption from special interests sufficient to justify the regulation's intrusion on the rights of free speech, free association and equal protection guaranteed to committees and their members by the First and Fourteenth Amendments?

b. Is the regulation narrowly tailored to meet the state's interest, given the existence of other statutory safeguards?

c. Is the regulation narrowly tailored to meet its goal of limiting special interest influence, given that it includes political parties?

d. Is the regulation underinclusive because the means selected are ineffective to accomplish the state's purpose?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners John Gard, Friends and Neighbors of John Gard, David T. Prosser, Gregg Underheim, Republican Party of Marinette County, Republican Party of Oconto County and Republican Assembly Campaign Committee, and the Respondents Wisconsin State Elections Board, Common Cause in Wisconsin, Wisconsin League of Women Voters, Inc., David Travis, Friends of Dave Travis, Thomas Loftus, The Democratic Party of Dane County, and The Assembly Democratic Campaign Committee.

All parties are before this Court.

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The petitioners John Gard, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Wisconsin, entered in the above-entitled proceeding on June 27, 1990.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 156 Wis. 2d 28, 456 N.W.2d 809 (1990), and is reprinted in its entirety in the Appendix hereto, p. A-1, *infra*.

This was an original action before the Supreme Court of the State of Wisconsin. Therefore, the June 27, 1990 opinion is the only judicial decision in this case.

JURISDICTION

The petitioners brought an original action before the Supreme Court of the State of Wisconsin (hereafter "Wisconsin Court") claiming, *inter alia,* that WIS. STAT. § 11.26(9)(a) violates the First and Fourteenth Amendments to the United States Constitution. On June 27, 1990, the Wisconsin Court ruled that the statute does not violate the First or Fourteenth Amendments to the United States Constitution.

The jurisdiction of this Court to review the judgment of the Wisconsin Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or proper-

> ty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statute at issue, WIS. STAT. § 11.26(9)(a) (West 1989 Supp.), states:

> No individual who is a candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees.

Other relevant provisions of the Wisconsin Campaign Financing Act, 1973 Wis. Laws, Chapter 334, codified at WIS. STAT. §§ 11.001 *et seq.* (West 1989 Supp.) are reprinted in the Appendix, p. A-61, *infra*.

STATEMENT OF THE CASE

A. The Wisconsin Campaign Financing Law (Chapter 11, Wisconsin Statutes).

This case is a challenge to the constitutionality of WIS. STAT. § 11.26(9)(a), a provision in Wisconsin's Campaign Financing Act. Like the Federal Act, the Wisconsin Act limits the amount which a single committee or an individual may contribute to a particular candidate. However, through § 11.26(9)(a), the Wisconsin Act limits the aggregate amount which a candidate may accept from all committees.[1] The aggregate all-committee limit challenged here is not strictly a contribution limit, but rather "has aspects of a contribution limit, an expenditure limit, and a source restriction." 65 Op. Wis. Att'y Gen. 237, 242 (1976). *See also,* Comment, *The Best Laid Schemes of Mice and Men: Campaign Finance Reform Gone Awry,* 1989 Wis. L. Rev. 1465,1473-1475; Comment, *Campaign Finance in Wisconsin After Buckley,* 1976

[1] "Committee" is defined in WIS. STAT. § 11.01(4).

Wis. L. Rev. 816, 855-856. There is no current federal counterpart.[2]

The § 11.26(9)(a) limit is set in absolute dollar amounts. It is not based on a percentage of the candidate's contributions. The dollar limit is pegged at 65% of the applicable "disbursement level" under WIS. STAT. § 11.31. For example, the applicable disbursement level for Assembly candidates during petitioner John Gard's 1987 campaign (*infra* at 7-8) was $17,250, so the cap on total committee contributions to Gard was $11,213. WIS. STAT. §§ 11.26(9)(a) and 11.31(1)(f).

The challenged limit applies to all committees. To understand its impact, it is necessary to outline the Act's regulation of committee activity in general. The Act recognizes two types of committees: "party committees" and "PACs." "Party committees" come in two types. One is the "political party committee," which is the state party organization, including its local affiliates. WIS. STAT. § 5.02(13). The second is the "legislative campaign committee," which is established by the major party legislators for each of the two houses of the state Legislature. WIS. STAT. § 11.01(12s). Each major party thus has three party committees —the state party (*e.g.*, "Democratic Party of Wisconsin") and two legislative campaign committees (*e.g.*, "Democratic Senate Committee" and "Assembly Democratic Campaign Committee").

The Act affects party committees in two significant ways. First, the Act prohibits party committees from making independent expenditures because it is presumed that party committees act in

[2]Proposed legislation currently before the Congress (S. 137—the Senate Election Campaign Ethics Act of 1990) does include a similar provision. Also, the Wisconsin Court stated in its June 27, 1990 opinion that five other states have similar provisions. App., p. A-20 n. 17.

coordination with their candidates.[3] Thus a party committee's only outlet for expressing candidate support is contributions. Second, party contributions are limited by the aggregate committee limit challenged here. Contributions so limited include not just money. In-kind services, such as campaign work by party staff, are also applied against the limit. WIS. STAT. § 11.01(6)(a)1. Thus, once a party's candidate has reached the aggregate limit in § 11.26(9)(a), a party committee is precluded from expressing its support for him or her.

The second class of committee recognized by the Act is "PACs." A PAC is simply a committee which is not a party committee. The Act treats all PACs alike, regardless of whether they are economic or ideological, single or multi-issue, large or small.[4] In addition to the challenged limit, PAC contributions are also subject to a separate (and lower) aggregate limit. WIS. STAT. § 11.26(9)(b). The aggregate limit on all committee contributions (§ 11.26(9)(a)) is challenged here; the aggregate limit on PAC contributions is not.

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[3]In a preamble to a revision of certain provisions in the Act, the Legislature stated:

> The legislature finds that political party and legislative campaign committees ordinarily act in cooperation or consultation with candidates or their agents or authorized committees and that political party and legislative campaign committees cannot, therefore, avail themselves of the opportunity to make independent expenditures to advocate the election or defeat of a clearly-identified candidate.

1985 Wis. Act 303 § 1.

[4]For analysis of differences between different categories of PACs, such as economic (corporate, labor, trade association) and ideological (or "nonconnected") PACs, *see* Adamany, *Political Action Committees and Democratic Politics,* 1983 Det. C. L. Rev. 1013, 1025-1026; Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns,* 31 Clev. St. L. Rev. 395, 401 (1982) ("Not all the PACs are established by labor unions, corporations, trade associations and other special interests."); and Epstein, *The PAC Phenomenon: An Overview,* 22 Ariz. L. Rev. 355, 356 (1980).

The Act also limits a PAC's contributions to a particular candidate. For example, a PAC may contribute no more than $500 to an Assembly candidate. WIS. STAT. § 11.26(2)(c).

Unlike party committees, PACs may make independent expenditures on behalf of candidates. Therefore, a PAC is not foreclosed by the aggregate limits from expressing its support of the candidate. Regardless of what it has contributed directly to a candidate, a PAC may spend an unlimited amount to express its support.

The Act contains safeguards to prevent circumvention of contribution limits and specifically to prevent PACs and parties from colluding to evade limits. The safeguards in the Act include:

1. A limit on aggregate PAC contributions to each candidate is imposed separate from the limit on all committee contributions challenged here. WIS. STAT. § 11.26(9)(b).

2. A $6,000 limit is imposed on annual contributions to a party committee by a PAC, including its subunits or affiliates. WIS. STAT. § 11.26(8)(b).

3. A $150,000 per biennium limit is imposed on aggregate PAC contributions to a party committee. WIS. STAT. §§ 11.26(8)(a) and 11.265(2).

4. To avoid evasion of the limits by proliferation of party committees, these limits are applied collectively to include the state committee, and all county, congressional, legislative, local and other affiliated party committees. WIS. STAT. § 5.02(13).

5. "Earmarking" is prohibited: PACs cannot agree with other PACs or party committees as to how their contributions will be used. WIS. STAT. § 11.16(4)(b).

6. "Laundering" is prohibited: no person may, directly or indirectly, furnish funds or property to another for the purpose of making a contribution in other than his or her own name and no person may intentionally accept or receive any such contribution. WIS. STAT. §§ 11.24(1) and 11.30(1).

7. Corporations are prohibited from making any political contributions or expenditures, directly or indirectly. WIS. STAT. § 11.38(1)(a)1. A corporation may establish and administer a "separate segregated fund," but may spend no more than $500 annually for solicitation of contributions to that fund. WIS. STAT. §§ 11.38(1)(a)2. and 3. The "separate segregated fund" established by a corporation must register and report as a PAC and is subject to the same contribution limits, anti-earmarking and anti-laundering provisions as all other committees.

8. The Act requires itemized and certified disclosure of sources and uses of campaign funds by committees, candidates, and corporations which establish PACs. WIS. STAT. §§ 11.05(1), 11.06 and 11.38(1)(a)2. Party committees, for example, must disclose each source of contributions over $20. WIS. STAT. § 11.06(1)(a). These requirements encompass out-of-state committees. National party committees must file special statements with the State Elections Board (the "Board") under WIS. STAT. §§ 11.06(3w)(a) and (b). False reports are a violation of the Act. WIS. STAT. § 11.27(1).

9. Violation of any provision of the Act exposes the violator(s) to civil penalties and, if deliberate, criminal penalties. WIS. STAT. §§ 11.60 and 11.61.

The Board is the statewide enforcement officer for the Act. In addition, the Board serves as the filing officer for the itemized reports of candidates and committees described above, and issues biennial reports on campaign financing activity.

B. The Complaint Against John Gard.

This constitutional challenge arose out of a complaint filed in the Oconto County, Wisconsin Circuit Court by the Board against State Representative John Gard and his campaign committee for violation of the aggregate committee limit in WIS. STAT. § 11.26(9)(a). The Board alleges that Gard and his committee received $18,820 from committees in the 1987 campaign

for the seat from the 88th Assembly District, violating the $11,213 limit on contributions from all committees.

The 1987 campaign was a special election to fill a vacancy in the 88th District.[5] Seven candidates sought the nomination in a Republican party primary election on September 8, 1987. After winning that primary, Mr. Gard defeated a Democratic candidate in the October 6 special election by a vote of 5,037 to 4,726.

The § 11.26(9)(a) aggregate limit combines contributions made during primary and general election campaigns. During the election campaign against his Democratic opponent, Mr. Gard received a significant amount of assistance from the state Republican party in the form of in-kind services. Of the $18,820 which he allegedly received from committees, a total of $10,973 came from party committees, and of that amount, 82 percent was in the form of in-kind contributions (*e.g.*, Republican party staff assistance).

Because of the important constitutional issues involved, the petitioners asked the Wisconsin Court to exercise original jurisdiction over this matter and to issue a judgment declaring that § 11.26(9)(a) is unconstitutional and unenforceable. Their petition (App., p. A-38) contended that the aggregate limit on committee contributions violates rights guaranteed candidates and committees by the First and Fourteenth Amendments to the U.S. Constitution and raised the following specific issues:

> 1. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the resultant limitation on a candidate's campaign expenditures?
>
> 2. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the restrictions placed on committees' freedom of speech and of association?

[5]In a seven-page letter dated September 20, 1989 to the Board's legal counsel (App., p. A-52), Mr. Gard set forth in detail the events in the primary and special election.

3. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the restrictions placed on the opportunity for individuals to associate through committees?

4. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the Legislature's discrimination against committee contributors?

The facts necessary to resolve these questions were stipulated by the parties. App., p. A-51.

The Wisconsin Court granted the petition on February 20, 1990 and stayed proceedings in the Oconto County Circuit Court. On April 3, 1990, the Court granted a motion to intervene filed by Respondents Common Cause in Wisconsin, Wisconsin League of Women Voters, Inc., David Travis, Friends of Dave Travis, Thomas Loftus, The Democratic Party of Dane County, and The Assembly Democratic Campaign Committee.

In their briefs and at oral argument, the petitioners argued that the aggregate committee limit in § 11.26(9)(a) is invalid because: (1) it burdens rights of free speech and free association without a compelling state interest; (2) other safeguards in the Act are sufficient to meet the perceived risk of excess PAC influence at which the limit is aimed; (3) it is overbroad because it includes *all* committees, not just those which pose the risk of excess PAC influence; (4) in restricting the exercise of rights by party committees, it does not target the exact source of the evil it seeks to remedy; (5) it is underinclusive because it limits the role of political party committees and thereby increases PAC influence; (6) it is underinclusive because the campaign finance law contains loopholes which permit increased PAC influence; (7) it limits expenditures by candidates and political parties in violation of the principles set forth in *Buckley v. Valeo,* 424 U.S. 1 (1976); (8) it discriminates in favor of early committee contributions over later contributions; and (9) it discriminates in favor of individual contributors over those who contribute through committees.

C. The June 27, 1990 Wisconsin Court Decision.

In its opinion (App., p. A-1), the Wisconsin Court rejected these arguments. The court found the aggregate committee limit necessary to further a compelling state interest in "preventing narrow issue PACs from circumventing PAC-candidate contribution limits through contributions to party-related committees, thereby unduly influencing an individual candidate's campaign," and that the statute is narrowly tailored to accomplish that goal. App., pp. A-36 and A-37.

The Wisconsin Court stated that because the statute burdens rights of free speech and association it must withstand strict scrutiny. Further, the court stated that the only compelling state interest to justify the limit would be the prevention of actual or apparent corruption. The court found such a state interest in the need to limit "the impact of huge special interest contributions on a candidate." App., p. A-23. From legislative history, the court found that the limit was specifically aimed at the ability of special interest PACs to "launder" money through the political parties. App., p. A-18. Citing Election Board statistics, the Court found that party committees "are primarily funded with PAC money." App, p. A-22. The resulting "potential impact of large PAC contributions," in the view of the court, established a compelling state interest in preventing domination of candidates by "narrow interest PAC money." *Id. See also* App., p. A-23.

Having found a compelling state interest, the court then determined that § 11.26(9)(a) is narrowly tailored. First, it found that the statutory safeguards cited by petitioners (*infra* at 6-7) "are not enough" to "maintain the integrity of the political process and prevent corruption caused by large contributions" from "narrow special interest" groups. App., p. A-25.

The court also discounted the effect of the aggregate all-committee limit on the exercise of First Amendment rights in campaign financing. Because the court found that a candidate "may

always return" contributions from some committees in order to accept contributions from other committees, it concluded that a committee is not prohibited from contributing to a candidate who has reached the "committee limit." App., p. A-27.

Moreover, the court pointed out that committees have means of campaign finance activity other than contributing to candidates. For example, PACs may make independent expenditures on behalf of candidates. App., p. A-28. The court acknowledged that a party committee, unlike a PAC, may not participate in campaign financing through independent expenditures. However, the court found it important that parties are not subject to the single-donor limits on contributions to candidates, they may participate in generic party-building activities, and they may act as "conduits" for individual contributions to candidates. App., pp. A-28 and A-29. Wisconsin law allows a committee to "pass through" the contributions of others if the committee qualifies and reports as a "conduit." WIS. STAT. §§ 11.01(5m), 11.05(9), and 11.06(11)(c).

The court also rejected arguments that § 11.26(9)(a) is overbroad because it lumps together all committees without evidence that they share the characteristics of PAC dominance at which the regulation is aimed. The court stated that "the issue is whether there is a potential for corruption," and found that such potential exists for all committees "regardless of whether they are rich, poor, single-issue or diverse." App, p. A-31. The court specifically rejected petitioners' claim that party committees do not share the "corrupting" characteristics of PACs, by citing statistics showing that legislative campaign committees (one type of party committee) are heavily funded by PACs. App., p. A-26. In addition, while acknowledging that "we do not have any evidence before us" to conclude that state party committees receive significant PAC contributions from national party committees, the court declared it is "convinced that there is certainly the potential for this type of abuse." App., pp. A-26 and A-27.

The underinclusiveness challenge was also rejected. Petitioners had argued that the Act is underinclusive because it undermines the purported purpose of the challenged limit—curbing excess PAC influence—by allowing PACs to make unlimited grants to candidates through "conduits." Petitioners also claimed that this aggregate committee limit is not well suited to accomplish its goal of limiting PAC influence because the limit is not expressed as a percentage of a candidate's actual spending level. In other words, it is not tied to the PAC's influence over the candidate.[6]

Responding to the first of these underinclusiveness arguments, the court recognized that conduits may pose a "potential" for abuse, but that potential does not justify abandoning the challenged aggregate committee limit. App., p. A-31. The court did not address petitioners' argument that the challenged limit is underinclusive because it is unrelated to the proportion of a candidate's funding from PACs.

The court summarily disposed of petitioners' free association arguments. It rejected petitioners' claim that the statute's special restrictions on committees (vs. individuals) cause individuals to dissociate themselves from committees, because individual contributors to committees are "never guaranteed that their contributions will ultimately be transmuted into a contribution to the candidate." App., p. A-32.

Petitioners claimed the aggregate committee limit violates equal protection because there is no corresponding limit on individual contributions and no constitutionally acceptable basis for

[6]For example, two candidates may accept the maximum in aggregate committee contributions, but spend vastly different amounts of money. The PAC interests will have a significantly different degree of influence in those two races. The low spending candidate, who obtains a greater proportion of campaign needs from committees, is more beholden to those committees and more likely to be corrupted. The limits do not consistently prevent corruption or its appearance because they are not tied to the degree of actual or perceived influence: they are not tied to a percentage of the candidate's total receipts.

concluding that individual contributions are less corrupting than those of committees. The Wisconsin Court apparently justified the distinction between committees and individuals by declaring that "all committees, regardless of whether they are rich, poor, single-issue or diverse" pose a potential for corruption. App., p. A-31. The court also relied on the fact that WIS. STAT. § 11.26(4) prohibits an individual from contributing more than a certain amount to all candidates and committees. App., p. A-34.

Finally, the court rejected the argument that the statute creates arbitrary timing distinctions between early-contributing committees (which can contribute up to the single committee limit) and late contributing committees (which are banned from any contribution to a candidate who has already reached the § 11.26(9)(a) limit).

The court issued a declaratory judgment that § 11.26(9)(a) is constitutional and vacated its stay of the trial court proceedings. Thereafter, on August 2, 1990, the parties stipulated to and the trial court ordered a stay of proceedings in the trial court pending resolution of this petition by the U.S. Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

In Basing its Decision on the "Potential" for Abuse or Corruption, the Wisconsin Supreme Court Effectively Abandoned Strict Scrutiny and Expanded the Permissible Grounds for Restricting Campaign Spending.

The Wisconsin Court has added a new state interest to those identified by this Court as sufficiently compelling to justify campaign finance regulations. The result is that the court substituted a rational basis test for the strict scrutiny required by this Court's decisions.

The only compelling interests thus far identified by this Court for intruding on the First Amendment freedoms inherent in campaign financing are the prevention of *actual or apparent corrup-*

tion. Austin v. Michigan Chamber of Commerce, – – U.S. – – , 110 S.Ct. 1391, 1397 (1990); *F.E.C. v. National Conservative Political Action Committee ("NCPAC")*, 470 U.S. 480, 496-497 (1985). However, the Wisconsin Court has now added a new justification: the prevention of the *potential* for corruption.

The court defined "the issue" before it as "whether there is a potential for corruption." App., p. A-31. To answer that question, the court found that: all PACs, "regardless of whether they are rich, poor, single-issue or diverse," carry the "potential for corruption" (*Id.*); a compelling state interest exists because of the "potential impact" of large PAC contributions on individual candidates (App., p. A-22); the statute is narrowly tailored to prevent "either actual or potential corruption" (App., p. A-5); "there is potential" for PACs to circumvent contribution limits (App., p. A-25); "there is certainly the potential" for "abuse" in laundering PAC money through national to local parties (App., p. A-27); and there is a "potential for undue domination of a candidate's campaign by narrow interest PAC contributions" (*Id.*).

In expanding the scope of "compelling state interest" to include the "potential" for corruption, the Wisconsin Court distorted the constitutional analysis. All campaign finance activity by any source—whether individual or committee—carries the *potential* for corruption. The "potential for corruption" standard means that any campaign finance regulation can be salvaged if it can be said to address a hypothetical risk (*i.e.*, "potential" for corruption). "Potential for corruption" means a mere *possibility* of corruption. Possibilities are not sufficient justification for intruding on First Amendment rights. NCPAC, 470 U.S. at 498.

When the Wisconsin Court broadened the scope of "compelling state interest" to include "potential for corruption," it substituted a rational basis test for strict scrutiny.[7] The

[7]For a discussion of these issues in the campaign financing context, *see* BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*. 73 Cal. L. Rev. 1045, 1081-1082 (1985).

court disavowed "blind" deference to the Legislature when First Amendment rights are burdened. App., p. A-16. However, in concluding that a "potential" for corruption is sufficient to justify the regulation, it proceeded to rely on *FEC v. National Right to Work Committee ("NRWC")*, 459 U.S. 197, 210 (1982). App., pp. A-22, A-25, and A-27. The court disregarded *NCPAC*, 470 U.S. at 500-501, which limited application of the legislative deference in *NRWC* to regulation of the long-recognized risks accompanying campaign activity by corporations. *See also, FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 260 (1986). Unlike *NRWC*, this case does not involve a regulation directed toward corporate activity.

The Wisconsin Court's adoption of a *de facto* rational basis test allowed it to justify the statute by making a series of assumptions: (1) any PAC, "regardless of whether [it is] rich, poor, single-issue or diverse," could corrupt candidates (have the "potential for corruption") (App., p. A-31); (2) without the aggregate committee limit, political parties could be used to funnel potentially corrupting PAC money to candidates (App., p. A-25); (3) other safeguards under the Act are inadequate to prevent laundering of potentially corrupting PAC money through parties to candidates (*Id.*); and (4) contributions are not barred because candidates throughout a campaign "may always return some contributions from committees in order to accept contributions from other committees." App., p. A-27.

The Wisconsin Court's lumping together of all PACs—rich, poor, single-issue or diverse—is identical to that condemned by this Court in *NCPAC* as overbroad:

> Even were we to determine that the large pooling of financial resources by NCPAC and FCM did pose a potential for corruption or the appearance of corruption, § 9012(f) is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to

> informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate.

470 U.S. at 498.

The Wisconsin Court distrusts PACs. But there is no more evidence in this case than in *NCPAC* that PAC contributions are inherently corrupting, or any more inherently corrupting, than those of individuals.

Even if PAC contributions were inherently corrupting, the state would still have to justify the statute's impositions on party committees, which are concededly not "narrow interest" nor corrupting. It is difficult to imagine how parties could corrupt their own candidates, particularly in light of the presumption in Wisconsin law that parties are incapable of acting independently of their candidates (see *infra* at 4-5).

To justify the fact that the limit includes political parties as well as PACs, the Wisconsin Court made its second assumption: that parties could be used to funnel potentially corrupting PAC contributions to candidates. App., p. A-25. The court's reliance on the hypothetical "potential for corruption" relieved the state of the burden to show any evidence of what this Court has deemed the "hallmark of corruption"—the financial *quid pro quo* of dollars for political favors—or a prearrangement or coordination of such activities. *NCPAC*, 470 U.S. at 497; *Buckley*, 424 U.S. at 47.

There is no evidence here of actual or apparent corruption by PAC use of parties. The Wisconsin Court found the potential for corruption from the simple fact that a PAC may contribute to a party which may in turn contribute to a candidate. However, under Wisconsin law no single PAC (including its subordinates or affiliates) may contribute more than $6,000 a year to a party committee. WIS. STAT. § 11.26(8)(b). Thus, to the extent the

party is funded by PACs, it collects funds from a myriad of different PACs, representing diverse and varying interests. Further, a party supports many candidates. There is no certainty that the PAC contribution to a party will go to a particular candidate. Indeed, for a PAC to corrupt a candidate through a party would require prearrangement and coordination on the part of the PAC, party and candidate. Such prearrangement is prohibited and exposes each of the participants—PAC, party and candidate—to criminal penalties. WIS. STAT. §§ 11.16(4)(b) and 11.61. The hypothetical possibility of PACs using parties to corrupt candidates hardly rises to the level of a "potential for corruption," much less the actual or apparent corruption required by the decisions of this Court.

The risk of corruption from PAC use of parties can be compared to the risk of corruption from PAC independent expenditures. The latter was addressed by this Court in *NCPAC*:

> [T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more.

470 U.S. at 498.

The same can be said of the "potential" corruption relied on by the Wisconsin Court. As in *NCPAC*, prearrangement and coordination are prohibited. Even if parties were substantially funded by PACs, the risk that PAC contributions to the parties would be exchanged for political favors from candidates is a "hypothetical possibility and nothing more." Under the Wisconsin Court's "potential for corruption" test, a hypothetical possibility supports the statute. Under strict scrutiny, it does not.

Moreover, the Wisconsin Court's essential premise—that party committees "are primarily funded with PAC money" (App., p. A-22) is plainly incorrect from the record. To make that conclusion, the court cited one type of party committee—legislative campaign committees. The broader question is how much of *all* party money comes from PACs. Figures from the Wisconsin State Elections Board show that only a small proportion of Wisconsin party funds come from PACs. Of a total income of $5,287,177 in the 1987-1988 biennium, the party committees received only $590,366 (11%) from PACs. App., p. A-60.

The decision contains another example of the Wisconsin Court's reliance on the "potential for corruption" factor in the compelling state interest analysis. The court found a risk that PAC money would be laundered through national parties to state parties and ultimately to candidates. The court admitted it did not have "any evidence" of such laundering. App., p. A-26. Nonetheless, that risk was sufficient justification for the statute, because "there is certainly the potential" for abuse resulting from such laundering and the court was "convinced" of such potential. App., p. A-27. (Again, such laundering would expose all the participants to criminal penalties. WIS. STAT. §§ 11.24(1), 11.30(1), and 11.61.)

The Wisconsin Court's reliance on "potential corruption" can be contrasted with the documented evidence of campaign finance abuses cited by this Court in *Buckley v. Valeo,* 424 U.S. at 27 n. 28 (citing *Buckley v. Valeo,* 519 F.2d 821, 839-840 and nn. 36-38 (D.C. Cir. 1975)). The abuses chronicled there demonstrated far more than "potential" *quid pro quo.* They showed actual or apparent corruption (*e.g.*, prearrangement and coordination of dairy organization contributions with presidential fundraisers, disclosures of illegal corporate contributions, and promises of ambassadorial posts). *Buckley,* 519 F.2d at 839-840 nn. 36-38.

The third assumption on which the Wisconsin Court relied to justify the regulation was that other safeguards in the Act (set forth *infra* at 6-7) are inadequate to prevent PACs from corrupting candidates and specifically from using party committees to corrupt candidates. App., p. A-25. In *Buckley,* this Court relied on substantially similar safeguards to reject the argument that independent expenditure limits were necessary to prevent PACs and candidates from colluding in ostensibly independent expenditures. The *Buckley* court found that the substantial penalties and reporting requirements in the federal election law would be adequate to police the limits in the Federal Act. 424 U.S. at 55-56. Likewise, the safeguards in the Wisconsin Act are adequate to prevent the risk of PAC-party laundering relied on by the Wisconsin Court to justify the aggregate limit.

The fourth assumption on which the Wisconsin Court relied was that a candidate may always return some contributions from committees in order to accept contributions from other committees. App., p. A-27. In this way, the court rejected petitioners' claim that § 11.26(9)(a) forecloses a committee from making any expression of support, even a symbolic one, once a candidate has reached the aggregate limit from committees.

This rationale is incorrect for several reasons. First, it overlooks the fact that contributions may include in-kind services, as is the case in the Board's complaint against John Gard. How is a candidate to return an in-kind contribution? Second, it overlooks WIS. STAT. § 11.06(4)(b), which requires a candidate to report a contribution as received and accepted unless it is returned or donated within 15 days of receipt. Thus, the court's "may always return" rationale does not apply to any contributions which have not been returned within 15 days of their receipt.

The third problem with the court's rationale is perhaps the most troubling. According to the court, a candidate "will select

which groups he receives support from and in what amounts." App., p. A-27. To tell a candidate that he or she may pick and choose in such manner would hardly appear consistent with the state's goal of avoiding PAC-candidate collusion.

II.

The Wisconsin Decision Has Substantial Impact on the Exercise of First Amendment Rights by Political Parties.

This Court has previously considered regulation of campaign finance activity by political action committees. It has not yet dealt with the constitutional issues peculiar to such regulation of political parties. *See* Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities,* 56 Fordham L. Rev. 53, 91 (1987); Freeman, *Political Party Contributions and Expenditures Under the Federal Election Campaign Act: Anomalies and Unfinished Business,* 4 Pace L. Rev. 267, 274-275, 287-293 (1984). The free speech and free association rights of parties and their members have been recognized by this Court. *Eu v. San Francisco County Democratic Central Committee,* 489 U.S. 214, 109 S.Ct. 1013, 1020-1021; *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 214 (1986).

The complaint against John Gard illustrates how WIS. STAT. § 11.26(9)(a) operates to restrict the ability of political parties to express support for their candidates. The Board's case against Gard contains no allegations of anything resembling "corruption"; instead, Gard's only alleged violation is that he accepted an illegal amount of financial support—most of it in the form of in-kind services—from his party. The Wisconsin Court does not justify this intrusion on the rights of parties and their members by identifying any actual or apparent corruption in the relations between parties and their candidates. Instead, it does so by: (1) claiming that the intrusion is only marginal (App., p. A-36); (2)

disregarding the difference between party committees and PACs; and (3) rejecting or ignoring petitioners' underinclusiveness claims.

Central to the court's decision was its finding that the aggregate limit is only a "marginal" restriction on the rights of parties, their members, and their candidates. That finding disregards important differences between the characteristics of parties and PACs which affect the constitutional analysis. The first is that parties, unlike PACs, can exercise the constitutional rights inherent in campaign financing only through contributions to candidates. A PAC can make unlimited independent expenditures to support a candidate: a party cannot. The Wisconsin Court discounted this factor because: (1) parties are free to engage without limit in "generic party-building activities"; and (2) parties are not subject to the single-donor contribution limits applied to PACs. App., pp. A-28 and A-29.

For a PAC, free to make unlimited independent expenditures to support a candidate, the aggregate limits may be only marginal restrictions on free expression. For a party, they are much more. The party's role is limited to direct monetary contributions and staff support, such as that provided petitioner Gard. The cost of staff support is treated by the Wisconsin Act as an "in-kind" contribution, and counted against the aggregate limit. Under the Wisconsin Act, those contributions are the measure of the parties' role; when they reach the aggregate limit, the voice of the party is stilled. "Generic party-building activities" are no substitute. The aggregate limit is a substantial restriction on the rights of parties and their members to express support for specific candidates.

There is a second fundamental distinction between PACs and parties. The "corruption" justification has no application to the latter, for several reasons.

First, Wisconsin law presumes that party committees act in concert with their candidates. *See infra* at 4-5. A party's spending for its candidate is essentially the same as a candidate's spending on his or her own behalf. Therefore, allowing a party to make unlimited contributions to its candidate could not be corrupting. *See* Nahra, *supra* p. 20, at 101-102, 105-106.

Second, the Wisconsin Court expressed great concern about potential corruption of candidates by "narrow interest" PACs. Parties cannot be tarred with that brush. In *Buckley v. Valeo,* 424 U.S. at 71, this Court said:

> In many situations, the label "republican" or "democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum.

The vital role of parties in the electoral process was recognized in *FEC v. Democratic Senatorial Campaign Committee* approving agency arrangements to encourage candidate loyalty and responsiveness to parties through effective use of party resources. 454 U.S. 27, 42 (1981). *See also* Freeman, *supra* p. 20, at 291. Further, unlike PACs, party contributions further the goal of limiting narrow-interest influence. They serve as a buffer between candidates and such interests and so "mute [the] individual influence" of contributors over candidates. Freeman, *supra* p. 20, at 292.

Third, in applying the corruption justification, the Wisconsin Court ignored the fundamental distinctions between the goals of parties and PACs.The court assumed that parties would allow themselves to be used to further PAC influence over candidates. But the last thing parties seek is to further the interests of PACs. There is a limited amount of money available for campaign financing. PACs and parties compete for that money. As PAC influence grows, that of parties declines. Cox, *supra* p. 5, at 401 ("Special interest money . . . is a factor in the decline in the influence of the political parties and makes it harder to build broad

coalitions in support of coherent programs"); Epstein, *supra* p. 5, at 358, 360-361; and Sorauf, *Political Parties and Political Action Committees: Two Life Cycles,* 22 Ariz. L. Rev. 445 (1980). Indeed, reducing restrictions on political parties could be important to limiting PAC influence. *E.g.*, Jackson, *Honest Graft: Big Money and the American Political Process* 300-302 (1988); Nahra, *supra* p. 20, at 106-109.

The record here confirms that PACs do not funnel contributions through parties. PACs could accomplish that end under the current Act by contributing up to $450,000 to the three committees for each party ($150,000 each to the state party committee, the senate campaign committee and the assembly campaign committee). WIS. STAT. §§ 11.26(8)(a) and 11.265(2). They have not done so. In 1987-88, all PACs gave the three Democratic party committees $363,000 and the three Republican committees $227,000. App., p. A-60.

In sum, the impact of the challenged limit on parties is to substantially limit their only meaningful exercise of First Amendment rights. The theory advanced by the Wisconsin Court to justify the challenged limit is that without it, parties and PACs will collude to funnel PAC money to candidates. That theory is undermined by the adversary relationship between parties and PACs and by this record. By restricting the activities of parties, the challenged limit actually enhances the role of their competitors—the PACs—in campaign financing.

The restrictions on parties' rights are also problematic because they are not the least restrictive means available for achieving Wisconsin's goal. By limiting the ability of parties to support their candidates in order to limit the influence of PACs, Wisconsin is targeting and eliminating more than the exact source of the "evil" it seeks to remedy. *Frisby v. Schultz,* 487 U.S. 474, 108 S.Ct. 2495, 2502-2503 (1988).

This problem is compounded by the statute's underinclusiveness. By permitting the use of "conduits" (*see infra* at 11-12), Wisconsin allows a PAC to present itself to a candidate as a benefactor while at the same time the monies are counted against the individual contributors' contribution limits and not those of the PAC. Thus, by collecting and passing on the funds of individual contributors, the PAC enjoys the recognition it receives from the candidate without having to be concerned about reaching its own contribution limit under § 11.26(2).[8]

In addition, the fact that § 11.26(9)(a) imposes an absolute dollar limit (*see infra* at 11-12), rather than a percentage figure, precludes Wisconsin from achieving its goal. A low-spending candidate receiving a higher proportion of his or her contributions from PACs is arguably more vulnerable to "undue influence" than is a candidate who spends more but receives a lower proportion of PAC contributions.

CONCLUSION

This Court has long recognized the vital role which constitutional rights play in campaign finance. The regulation challenged here—a statutory attempt to elevate the influence of individual contributors over committee contributors—is of first impression before this Court. It is unlike any of the campaign finance regulations previously reviewed by this Court. The Wisconsin Court has justified the statute by substantially expanding the scope of the only compelling state interest for campaign finance regulation identified by this Court. The result is the *de facto* application of a rational basis, rather than strict scrutiny, review of a campaign finance regulation. Finally, the case raises important constitutional questions about distinctions in campaign finance regulation between political parties and PACs. For all of these reasons, this Petition for a Writ of Certiorari should be granted.

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[8]For a detailed discussion of the use of conduits, *see* Comment, *The Best Laid Schemes, supra* p. 3, at 1482-1488, 1493.

Dated this 24th day of September, 1990.

Respectfully submitted,

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APPENDIX

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No. 90-0298-OA

STATE OF WISCONSIN: IN SUPREME COURT

JOHN GARD,
FRIENDS AND NEIGHBORS OF JOHN GARD,
DAVID T. PROSSER,
GREGG UNDERHEIM,
REPUBLICAN PARTY OF MARINETTE COUNTY,
REPUBLICAN PARTY OF OCONTO COUNTY
AND REPUBLICAN ASSEMBLY CAMPAIGN COMMITTEE,

Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD,

Respondent,

COMMON CAUSE IN WISCONSIN,
WISCONSIN LEAGUE OF WOMEN VOTERS, INC.,
DAVID TRAVIS,
FRIENDS OF DAVE TRAVIS,
THOMAS LOFTUS,
THE DEMOCRATIC PARTY OF DANE COUNTY,
AND THE ASSEMBLY DEMOCRATIC CAMPAIGN COMMITTEE,

Intervening-Respondents.

ORIGINAL ACTION FOR DECLARATORY JUDGMENT: RIGHTS DECLARED.

CHIEF JUSTICE HEFFERNAN. This is an original action brought by the petitioners pursuant to sec. 809.70, Stats., for a declaratory judgment seeking a declaration of the constitutionality of sec. 11.26(9)(a), Stats.,[1] of Wisconsin's campaign financing

[1]Section 11.26(9)(a), Stats., provides:
"No individual who is a candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level
(Footnote continued on following page)

law, which establishes an absolute dollar cap on the amount of funding, in the aggregate, a candidate may receive from all committees, including PACs (political action committees), political party committees and legislative campaign committees ("party-related committees").[2] We conclude that sec. 11.26(9)(a), Stats., is constitutional.

Petitioner, John Gard is the Representative to the Wisconsin State Assembly from the 88th Assembly District. Gard was first

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(Footnote continued from previous page)
determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees."

Sec. 11.31(1), Stats., sets forth a schedule of disbursement levels which operate as spending limits if a candidate accepts public financing. In addition, the disbursement levels provide a reference point for setting contribution limits such as in sec. 11.26(9), Stats. The disbursement level during the 1987 special election for an assembly candidate was $17,250 total in the primary and election, with disbursements not to exceed $10,775 for either the primary or the election. Sec. 11.31(1)(f), Stats.

[2]"Committee" and "political committee" are defined in sec. 11.01(4), Stats., as "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group' under this chapter."

Political party committees are statewide political organizations registered under sec. 11.05, Stats., such as the Republican Party of Wisconsin or the Democratic Party of Wisconsin. Sec. 5.02(13), Stats.

Legislative campaign committees are established by the members of each political party in each house of the Wisconsin Legislature. Sec. 11.265, Stats. There are currently four legislative campaign committees in Wisconsin: the Assembly Democratic Campaign Committee, the Republican Assembly Campaign Committee, the State Senate Democratic Committee, and the Committee to Elect a Republican Senate. *See* Shea, *Legislative Campaign Committees: The Wisconsin Experience* (1986) (available at Wisconsin Legislative Reference Bureau). *See also* 1989 Wis L.Rev. 1467, n.8.

The term "committee" includes all committees. We use the term "party-related committees" to refer to legislative campaign committees and political party committees and "PAC" to refer to all other committees.

elected to that seat in an October 6, 1987 special election and was re-elected in a general election held on November 7, 1988. "Friends and Neighbors of John Gard" is Representative Gard's registered campaign committee. Petitioners, David T. Prosser and Gregg Underheim, are Representatives to the Wisconsin State Assembly from the 57th and 54th Assembly Districts, respectively. Petitioners, Republican Party of Marinette County and Republican Party of Oconto County, are political party committees and Petitioner, Republican Assembly Campaign Committee, is a legislative campaign committee.

This case arises out of the Wisconsin State Elections Board[3] complaint against Representative Gard and his campaign committee alleging a violation of sec. 11.26(9)(a), Stats. *State of Wisconsin Elections Board v. John Gard and Friends and Neighbors of John Gard,* Case No. 89-CV-219, Oconto County Circuit Court. That complaint states that pursuant to secs. 11.26(9)(a) and 11.31(1), Stats., 1987, the limit on contributions that an assembly candidate could receive and accept during the November, 1987 special election campaign, from all committees combined including party-related committees, was $11,213. During the 1987 special election campaign in the 88th Assembly District, John Gard and his campaign committee received and accepted $18,820.32 from committees, thus exceeding the limit imposed by sec. 11.26(9)(a) by $7,607.32. The Board sought a $500 forfeiture pursuant to sec. 11.60(1), Stats., for the violation.

On February 13, 1990, Petitioners filed a Petition for Leave to Commence an Original Action in the Wisconsin Supreme Court seeking a declaration from this court on the constitutionality of sec. 11.26(9)(a), Stats. This court granted the petition on February 20, 1990, and ordered that the proceedings in Case No. 89-CV-219, pending in Oconto County Circuit Court be stayed

[3]The Wisconsin State Elections Board, "Respondent", is the administrative agency charged with enforcing Wisconsin's Campaign Financing Law. Sec. 5.05, Stats.

pending further order of this court. Leave to intervene was granted to various groups and individuals.[4]

Petitioners assert that sec. 11.26(9)(a), Stats., is unconstitutional on several grounds. First, they claim that the aggregate limit on the amount of money committees may contribute to a candidate's campaign violates committee members' First Amendment rights to political expression because it completely bars some committees from making even a symbolic expression of support evidenced by a contribution once the aggregate limit has been reached. Second, they argue that the aggregate limit on committee contributions is, in effect, a limit on the candidate's ability to spend, which impermissibly burdens a candidate's freedom of speech guaranteed by the First Amendment under *Buckley v. Valeo,* 424 U.S. 1 (1976). Third, they assert that the statute impermissibly burdens freedom of association also guaranteed by the First Amendment by encouraging individuals to disassociate themselves from committees. Fourth, petitioners argue that the statute imposes a greater burden on the First Amendment rights of committees than it does on the First Amendment rights of individuals in violation of the equal protection clauses of the United States and Wisconsin Constitutions. Petitioners also assert that the statute imposes a greater burden on the First Amendment rights of committees who contribute "late" in a campaign than on committees who contribute "early" in a campaign in violation of equal protection guarantees.

We find none of these arguments warrant holding that the questioned subsection of Wisconsin's Campaign Financing Law is unconstitutional. We conclude that there is a compelling state interest which justifies placing marginal restrictions on First and Fourteenth Amendment rights. Futhermore, we conclude that

[4]Common Cause in Wisconsin, Wisconsin League of Women Voters, Inc., David Travis, Friends of Dave Travis, Thomas Loftus, The Democratic Party of Dane County, and The Assembly Democratic Campaign Committee.

the Wisconsin legislature has narrowly tailored its aggregate contribution limit to accomplish its achieved end—the prevention of either actual or potential corruption.

Wisconsin has a long tradition of ensuring a government free from corruption.[5] In the early 1970's, in the wake of the "Watergate" affair, Wisconsin, along with several other states and Congress, introduced significant campaign finance reform legislation in an effort to purify the political process. *Campaign Finance Reform,* Research Bulletin 74-RB-1 p. 1, (available at the Wisconsin Legislative Reference Bureau). In 1973 Governor Patrick Lucey asked Professor David Adamany, a University of Wisconsin professor of political science, to chair a committee to conduct a study of campaign financing in Wisconsin. Id. at 14. The committee issued a tentative draft in October 1973, setting forth a preliminary proposal for comprehensive reform of Wisconsin's campaign financing law. Id. at 14.

The committee's findings were published in final form in March, 1974. *Governor's Study Committee on Political Finance: Final Report.* In his 105-page report, Professor Adamany explained that the then current Wisconsin law, the Wisconsin Corrupt Practices Act, enacted in 1911, was inadequate to curb corruption in campaign financing. Id. at 34. In response to the archaic and unrealistic limits on the amount of money candidates could spend on their campaigns for political offices set by the Corrupt Practices Act, candidates had set up "voluntary committees" which basically were unaffected by campaign financing legislation. Id. In addition, the law contained absolutely no limitations on the amount of money individuals or groups could contribute to an individual candidate or to all candidates. Id. at 36. Furthermore, Professor Adamany advised that the numerous de-

[5]For a history of campaign financing regulation in Wisconsin, along with a discussion suggesting the aggregate limit on committee contributions is unconstitutional see Comment, *Campaign Finance in Wisconsin After Buckley,* 1976 Wis. L.Rev. 816, 855.

fects in Wisconsin's law were compounded by the near absence of enforcement of the law. Id. at 45.

Professor Adamany and the committee recognized that the problem with campaign financing in Wisconsin was not that candidates were spending too much money. In fact, Professor Adamany emphasized that "[r]eform legislation must acknowledge the need to spend money for vigorous campaigning." Id. at 50. Instead, he surmised the problem with campaign financing to be that the funds available for financing campaigns were not made available from a large and representative contributor pool. Professor Adamany recommended five areas of reform: (1) expenditure limits on the amount candidates could spend when receiving public financing; (2) contribution limits on the amount an individual, political party, and special interests could contribute to an individual candidate and all candidates; (3) full disclosure of all financial transactions of campaign financing required; (4) establishment of a bipartisan enforcement commission; and (5) availability of public financing to insure clean money from a representative source for candidates. Id. at 50-52.

In response, Governor Lucey called the Wisconsin legislature into a special session to reform the campaign financing laws. Shortly thereafter, Governor Lucey signed into law Special Session Senate Bill 5, creating what is now Chapter 11 of the Wisconsin Statutes. Laws of 1973, Ch. 334 (published July 6, 1974). Section 11.001, Stats., provides the following declaration of policy:

> 11.001 Declaration of policy. (1) The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the

> voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

Section 11.26(9)a, Stats., is but one subsection in a comprehensive legislative scheme to reform campaign financing in Wisconsin. To evaluate the constitutional implications of sec. 11.26(9)(a), Stats., we must review it in the context of the entire Campaign Financing Act.[6]

One of the most important areas of campaign finance regulation is a restriction on the source and size of campaign contributions. In Wisconsin, candidates may accept money from four sources: their own resources, other individuals, public financing, and committees. Corporations are prohibited from making direct or indirect contributions to candidates, but may establish separate segregated funds, commonly known as PACs, for the purpose of administering contributions from individuals. Secs. 11.38(1)(a)(1) and (2). Candidates may make unlimited contributions of their

[6]For a recent discussion of Wisconsin's aggregate limit on committee contributions to candidates see Comment, *The Best Laid Schemes of Mice and Men: Campaign Finance Reform Gone Awry*, 1989 Wis. L.Rev. 1465.

own funds to their own campaigns. Sec. 11.26(5), Stats. Limits are placed on the amounts which an individual may contribute to specific candidates, which varies with the office sought, and a $10,000 limit is placed on the total contributions an individual may make to all candidates and committees combined in a calendar year. Secs. 11.26(1) and (4). If candidates accept public financing, limits are set on the total amount of money they may spend on their campaign. Sec. 11.31(2), Stats. Depending on the type of committee, limits are set on the amounts committees may contribute and receive.

The Campaign Finance Law creates essentially two classes of committees. An individual committee other than a political party committee or legislative campaign committee is what is commonly referred to as a PAC or special interest group. Limits are set on the amounts an individual committee, other than a political party committee or legislative campaign committee, may contribute to each candidate, depending upon the political office sought. Sec. 11.26(2), Stats. For example, in the 1987 Special Election, an individual PAC could contribute no more than $500 to an assembly candidate. Sec. 11.26(2)(c), Stats. The limits in sec. 11.26(2), Stats., apply only to PACs and not to political party committees and legislative campaign committees (party-related committees). Total contributions by each PAC to a party-related committee are also limited to $6,000 per year. Secs. 11.26(8)(c) and 11.265(2), Stats. In addition to the limits on individual PAC contributions to party-related committees, no party-related committee can receive over $150,000 from all PACs in a biennium. Secs. 11.26(8)(a) and 11.265(2), Stats. These limits on committee contributions to other committees do not apply to transfers between party-related committees.

Section 11.26(9)(a), Stats., however, places a restriction on party-related committees by limiting the total amount of money a candidate may accept from all committees combined. The cap in sec. 11.26(9)(a), Stats., is set at 65 percent of the total disburse-

ment level in sec. 11.31, Stats., which is the schedule of maximum disbursement levels for various political offices if public financing is accepted. Furthermore, sec. 11.26(9)(b), Stats., limits the total amount of money a candidate may accept from all PACs combined to 45 percent of the disbursement level.[7] Thus, while a candidate may accept up to 65 percent of the fixed disbursement level in sec. 11.31, Stats., from all committees, a candidate may accept only 45 percent of that amount from PACs.

To illustrate, during the November, 1987 special election campaign, the total disbursement level for a candidate for representative to the assembly was $17,250. Sec. 11.31(1)(f), Stats. The limit on contributions that an assembly candidate could receive and accept from all committees combined was $11,213 or 65 percent of $17,250. Of that total, no more than $7,763 or 45 percent of the total disbursements level, could be received and accepted by an assembly candidate from all PACs. Furthermore, each PAC was limited in the amount it could contribute to an assembly candidate to $500. Sec. 11.26(2)(c), Stats. Thus, candidates have the discretion to accept funds from these different committees in any amounts they choose, so long as they abide by the 65 percent limit for all committees and the 45 percent limit on PACs. For example, an assembly candidate could have accepted all of the $11,213 from party-related committees or could have accepted $7,763 (45 percent) from PACs and the remaining $3,450 (20 percent) from party-related committees. In any event 20 percent of the candidate's disbursement level is reserved for party-related committees.

Representative Gard allegedly violated the aggregate limit for all committees set by sec. 11.26(9)(a), Stats., and not the aggregate limit on contributions from PACs under sec. 11.26(9)(b),

[7]Section 11.26(9)(b), Stats., provides:
"No individual who is a candidate for state or local office may receive and accept more than 45% of the value of the total disbursement level
(Footnote continued on following page)

Stats., because he received less than $7,763 (45 percent limit) in contributions from PACs, but more than $11,213 (65 percent limit) from PACs and party-related committees combined.[8]

In addition to restrictions on the source and size of campaign contributions, there are a number of other reform measures in Wisconsin's Campaign Finance Law. All committees, candidates, and corporations which establish PACs are subject to registration and reporting requirements, including itemization of all contributors who have made contributions in excess of $20. Sec. 11.06, *See also* secs. 11.05, and 11.38(1)(a)2, Stats. Compliance with the Campaign Financing Law is encouraged by vigorous enforcement, including imposition of civil or criminal penalties for violations of its provisions. Secs. 11.60 and 11.61, Stats.

The regulation of political campaigns involves a careful balancing of two competing interests. Legislators are placed in the difficult position of trying to regulate political activity while at the same time allowing the political process to work free from government interference. "The area of campaign finance is unique because, in the campaign context, 'both the first amendment and the law with which it is in potential conflict are designed to accomplish the same broad purpose, namely to advance the interests of democratic self-government.' " Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities,* 56 Fordham L.Rev. 53, 59 (1987).[9]

(Footnote continued form previous page)
determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees other than political party and legislative campaign comittees subject to a filing requirement."

[8]Biennial Report of the Wisconsin State Elections Board (December 1989), p. I-178.

[9]*See also* Wright, *Politics and the Constitution: Is Money Speech?,* 85 Yale L.J. 1001, 1005-06 (1976); L. Tribe, American Constitutional Law sec. 13-27 (1978); and Cox, *The Supreme Court 1979 Term-Foreword: Freedom of Expression in the Burger Court,* 94 Harv. L. Rev. 1, 70 (1980).

We begin our discussion by setting forth some general principles from *Buckley v. Valeo,* 424 U.S. 1 (1976), the landmark Supreme Court decision which evaluated the constitutionality of several provisions of the Federal Election Campaign Act of 1971 (FECA), and from *Buckley*'s progeny. Limitations upon the giving and spending of money in political campaigns "operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14. Restrictions on campaign contributions and expenditures implicate both the rights of political expression and association protected by the First Amendment. Id. at 14 and 15. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Id. A major purpose of the First Amendment was to protect the free discussion of governmental affairs, including discussions about candidates. Id.

Because campaign financing regulations burden First Amendment rights of free speech and association, they can only survive strict scrutiny if it is shown that they serve a compelling governmental interest and that the regulations are narrowly tailored. *Buckley,* 424 U.S. at 44-45; *Austin v. Michigan Chamber of Commerce,* U.S. , 110 S.Ct. 1391, 1396 (1990). In *Buckley,* the Court emphasized, however, that " '[n]either the right to associate nor the right to participate in political activities is absolute' " and that even a " ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of" First Amendment rights. Id. at 25, In *Buckley,* the Court recognized that there is a compelling state interest in regulating campaign financing to prevent either actual corruption or the appearance of corruption "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." Id. at 27. *See also FEC v. National Conservative PAC,* 470 U.S. 480, 496-97 (1985), "We held in *Buckley* and reaffirmed in *Citi-*

zens Against Rent Control that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." Moreover, the *Buckley* Court recognized that restrictions on contributions to political campaigns pose a lesser threat to the First Amendment than do restrictions on expenditures.[10] The *Buckley* court struck down as unconstitutional limitations on independent expenditures and upheld as constitutional limitations on contributions to candidates. The Court stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. . . .
>
> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. . . .
>
> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size

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[10]The distinction between contributions or "speech by proxy" and expenditures has many critics, including members of the Court. *Buckley,* 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part); *Id* at 261 (White, J., concurring in part and dissenting in part); *Id* at 290 (Blackmun, J., concurring in part and dissenting in part); *Federal Election Comm. v. National Conservative Political Action Com.,* 470 U.S. 480, 519 (1985) (Marshall, J., dissenting); *Austin v. Michigan Chamber of Commerence,* U.S. , 110 S.Ct. 1391, 1407 (1990) (Stevens, J., concurring); Powe, *Mass Speech and the Newer First Amendment,* 1982 Sup. Ct. Rev. 243, 258-259.

> of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. [footnote omitted] A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

424 U.S. at 19-21.

See also California Medical Assn. v. FEC, 453 U.S. 182, 196 (1981).

It is subsection (a) of 11.26(9), Stats., which places a cap on the total amount of contributions a candidate may accept from all committees, including party-related committees and PACs, which the petitioners challenge. We conclude that sec. 11.26(9)(a), stats., which restricts committee contributions to a candidate's campaign, burdens the First Amendment rights to free speech and association of those committees and, therefore, is subject to strict judicial scrutiny. The statute will pass constitutional muster only if this court concludes that it is justified by the compelling state interest of preventing corruption or the appearance of corruption and if it is narrowly tailored to accomplish that end.

Respondents claim that sec. 11.26(9)(a), Stats., is a contribution limit, not an expenditure limit, and that restrictions on contributions require less compelling justification than restrictions on independent spending. *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 259-260 (1986). Petitioners, on the other hand, argue that sec. 11.26(9)(a), Stats., is an expenditure limit because it limits the amount of money a candidate can spend from a

particular source–committees. Petitioners argue that all aggregate contribution limits have the effect of limiting a candidate's spending by placing an absolute ceiling on the amount a candidate may receive from a source.[11] Petitioners assert that aggregate limits on committee contributions are different than aggregate limits on individual contributions, which were upheld in *Buckley*. The aggregate limit on committees places a cap on *all* committees, so that a candidate cannot receive any additional contributions from committees, even from those which have not contributed to the candidate's campaign or any other candidate's campaign. This is unlike the aggregate limit on individuals because, once a candidate has received the maximum amount allowed from a particular individual, that candidate may seek a contribution from the "next" individual. Petitioners claim that by placing an aggregate cap on committee contributions, sec. 11.26(9)(a), Stats., prohibits candidates from seeking a contribution from the "next" committee. Put another way, sec. 11.26(9)(a), Stats., places a limit on the amount a candidate may receive, which by implication places a limit on the amount a candidate may spend.[12]

The United States Supreme Court has recognized that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 at 21. In upholding FECA's contribution limits, the Court noted that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and

[11]Petitioners challenge only sec. 11.26(9)(a), Stats., and they claim that it is possible for this court to narrowly rule that sec. 11.26(9)(a), Stats., is unconstitutional, whereas the aggregate limit on PAC contributions in sec. 11.26(9)(b), Stats., may be upheld as constitutional. We disagree with this assertion. The same constitutional problems are implicated in both secs. 11.26(9)(a) and (b), Stats., because both place aggregate limits on contributions from a particular source.

[12]Candidates may not spend more than they can receive. Secs. 11.14(1) and 11.16(1), Stats.

to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." Id. at 21-22.

We disagree with Petitioners that, by limiting the amount of money that a candidate can accept from committees, the legislature is placing a limit on the amount of money that a candidate can spend. After a candidate has received the amount of money allowed by the aggregate limit from committees, the candidate can still receive an unlimited amount of money from other individuals, from their own sources, and from individuals through other sources such as conduits.[13] *See* infra at 33. Therefore, we conclude that sec. 11.26(9)(a), Stats., is a limit on the amount of money committees can contribute to a candidate and not a limit on the amount of money a candidate may spend and therefore is only a marginal restriction on speech.

This conclusion is supported by the legislative history of Wisconsin's Campaign Finance Law. The reformers of campaign financing were not concerned that candidates were spending too much money and, in fact, recognized that candidates needed to spend a considerable amount of money in order to have an effective campaign. The reformers were concerned, however, with large concentrations of money from an unrepresentative pool of contributions which would have a corrupting influence on candidates. *Governor's Study Committee on Political Finance: Final Report*, p. 49.

Respondents also argue that this court should defer to the legislative determination of where the balance should be struck

[13]In this respect, Wisconsin's aggregate contribution limit imposes significantly less restrictions on a candidate's ability to raise funds than the total ban on contributions during legislative session from any source struck down recently by the Florida Supreme Court in *State v. Dodd*, Filed May 8, 1990, 1990 Fla. LEXIS 667 (1990).

between regulation of campaign financing and the First Amendment.[14] They rely on the United States Supreme Court decision in *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982), ("*NRWC*"), in which Justice Rehnquist delivered the opinion for a unanimous court. In *NRWC,* the Court deferred to the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. The Court stated,

> While sec. 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the *potential* for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared. (emphasis added).

The Court afforded less deference to the legislature, however, in *FEC v. National Conservative PAC*, 470 U.S. 480, 500-501 (1985), where Justice Rehnquist wrote for a majority of the court and announced that "when the First Amendment is involved, our standard of review is 'rigorous.' " Recently, in *Austin*, the Court once again deferred to the legislative determination that a particular type of political expenditure—immense aggregations of wealth accumulated through the corporate form—undermines the integrity of the political process.

We conclude, however, that where the First Amendment is involved we cannot blindly defer to the legislative determination of where the constitutional balance should be struck. "To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." *Sable Communications of California, Inc. v. F.C.C.,* U.S. ,

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[14]See BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform,* 73 Cal. L. Rev. 1045, 1069 (1985) for a critique of the concept of deference to the legislative determination of where the balance between the First Amendment and regulation of campaign financing should be struck.

109 S.Ct. 2829, 2838 (1989). Therefore we independently review the legislative determinations that sec. 11.26(9)(a), Stats., was necessary to prevent corruption or the appearance of corruption and that it was the least restrictive means of achieving that legislative goal. We emphasize that we are reviewing the legislative decision to place an aggregate limit on contributions from a particular source and not the legislative decision of where to place that limit, i.e. 65 percent.

In *Buckley,* the court looked at a number of documented abuses to provide support for the conclusion that the legislative determination was correct.[15]

> Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

424 U.S. at 27.

Likewise, this court will look to materials from the Wisconsin Legislative Reference Bureau and State Elections Board, of which we properly may take judicial notice, *State ex rel. Strykowski v. Wilkie,* 81 Wis. 2d 491, 504, 261 N.W.2d 434 (1978), in determining whether the legislative enactment violates constitutional protections.

First we address whether there is a compelling state interest in limiting aggregate committee contributions. Here the Wisconsin legislature has determined that large committee contributions to individual candidates, either directly or through party-related committees, will undermine the integrity of the political process. The Respondents state two reasons why the aggregate contribution limit is necessary in order to prevent large committee contri-

[15]The Supreme Court opinion, 424 U.S. at 27, n.28, noted with approval that part of the Court of Appeals' decision in *Buckley v. Valeo,* 519 F.2d 821, 839-840 (D.C. Cir. 1975), which discussed campaign finance abuses as revealed by a myriad of sources from opinion polls to Congressional Reports.

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butions from corrupting the political system. The Respondents maintain that the aggregate limit is necessary to prevent PACs from circumventing the other contribution limits by passing money through party-related committees and, therefore, is directly related to the restrictions on the amount of money any individual committee may contribute to any individual candidate. In addition, they claim that the aggregate limits, together with other existing limits on PAC contributions, are essential in order to prevent undue influence of special interests on an individual candidate's campaign. We find that these arguments are supported by the facts revealed by legislative history and by examining the reports of the Wisconsin State Elections Board.

Our inquiry begins with the legislative history of Wisconsin's Campaign Financing Law. As mentioned above, limitations on contributions to candidate's campaigns are but one aspect of comprehensive legislation passed by the Wisconsin legislature in 1974. The impetus for this legislation was the findings of Governor Lucey's Study Committee on Political Finance, chaired by Professor Adamany. *Governor's Study Committee on Political Finance: Final Report.*

In this report, the committee explained why limitations should be set on the amount of money candidates could receive from associations and political committees. The committee recognized that committees play an important role in Wisconsin politics and that constitutional protections on freedom of association required that committees be allowed to participate in campaign contributing. Nevertheless, the study committee was concerned that committees would circumvent contribution limits. The committee was particularly concerned with the ability of special interest PACs to "launder" money through the political parties.[16] The report warned that restrictions on special interest committees must be tightly drawn.

[16]Id. at 37-38. "Laundering" money, or passing money through an entity or person to conceal its true origin, is prohibited by sec. 11.30(1), Stats.

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> Contribution limits should prevent large gifts and special interest gifts from dominating politics. Not only should an individual's contributions to particular campaigns and party committees be limited, his total political gifts in each calendar year should be restricted. Further, both individuals and special interests should be prevented from circumventing contribution limits through multiple committee giving and laundering. Restrictions must, necessarily, be tightly drawn to forestall such evasions.

Id. at 50.

Therefore, the committee recommended that a 25 percent contribution limit be set on the amount of money, in the aggregate, a candidate could receive from all committees combined. Id. at 73-74. The Report stated:

> The limit is imposed on the candidate. He is allowed to accept only 25 per cent of his expenditure limits from associations and political committees. He will select which groups he receives support from and in what amounts, but the aggregate of his support from such sources has a plainly defined ceiling. As California Assembly Speaker Jess Unruh once quipped, "He may sell shares in himself, but no one can buy a controlling interest."

Id. at 74.

The committee emphasized that the aggregate limit did not prevent committees from collecting and forwarding contributions to the candidate in the name of an individual, nor did it prohibit committees from making certain independent expenditures on behalf of the candidate. Id.

The concerns expressed in the Committee's Final Report were echoed in the drafting notes accompanying the passage of Wisconsin's aggregate limit on committee contributions by the Wisconsin legislature. In a memorandum entitled, "The Problems Inherent in Partially Limiting the Amount Special Interest Groups can Contribute", Senator William Bablitch, Senate Ma-

jority Leader, explained why limiting the amount each special interest group could contribute to a candidate was insufficient to accomplish the legislative goal of limiting the tremendous impact of special interests on individual campaigns. (Legislative Reference Bureau Drafting file—1973 Laws, Ch. 334) Senator Bablitch explained that a single special interest group could proliferate into many, thereby evading the individual contribution limits. In addition, he warned that special interest groups could evade the contribution limits by contributing to the major political parties "with a tacit understanding of which candidate is going to receive [the contribution]." To prevent such corruption, he recommended that an aggregate limit be set on all committee contributions to a particular candidate. The legislature placed that limit at 65 percent, not 25 percent as recommended by Professor Adamany. Sec. 11.26(9), Stats.

Since it was originally passed in 1974, this subsection has remained substantively intact. In 1977, the legislature renumbered the provision as sec. 11.26(9)(a) and added sec. 11.26(9)(b), Stats., which placed an aggregate limit on the contributions a candidate could receive from all PACs. 1977 Wis. Laws, ch. 107, secs. 30, 31. And in 1986, the legislature added contributions from legislative campaign committees to candidates to the 65 percent aggregate limit on all committee contributions set forth in sec. 11.26(9)(a), Stats. 1985 Act 303, sec. 51.

While Wisconsin's aggregate limit on committee contributions is somewhat novel, it is not an aberration. Five other states have subsequently adopted similar provisions, and Congress is currently considering proposed legislation which is similar to Wisconsin's.[17] The proposed federal legislation is aimed at the

[17]*See* Haw. Rev. Stat. sec. 11-205 (1985); Mont. Code Ann. sec. 13-37-218 (1989); Ariz. Rev. Stat. Ann. sec. 16-905.C (1989); La. Rev. Stat. Ann. sec. 18:1505.2H(7) (1990); Cal. Gov't Code sec. 85305 (1990). *See also* S. 197, 101st Cong., 2d Sess., Cong. Rec. (Mar. 21, 1990).

same evil as is sec. 11.26(9), Stats.,—to prevent PACs from having undue influence on any one candidate by circumventing the individual contribution limits through proliferation of committees or by channeling contributions through party-related committees. Report of the Committee on Rules and Administration, S. Rep. 101-253, 101st Cong., 2d Sess. (1990).

The findings of this Congressional Committee confirm the Wisconsin legislature's concern that without effective aggregate contribution limits, narrow interest groups have a corrupting influence on individual candidates. The Committee found that there was an enormous growth in the campaign financing role played by PACs and an increasing dependence by candidates upon such money.

> The Committee is concerned with the impact of such an increase in reliance on these [PAC] funds on the campaign finance system. The ability of political committees having similar interests to join together and make large contributions tends to undermine the effectiveness and integrity of the present system of limits on contributions. It believes that the imposition of a ceiling on *aggregate contributions* from such committees would restore the integrity and effectiveness of the existing and constitutionally sound limits on contributions by any single such political committee, person or other individual to a candidate.

Id. at 16. (emphasis supplied)

Even the Committee's minority report states that large contributions from groups with a narrow special interest bias can have the "unacceptable appearance of legislative 'quid pro quos'." Id. at 74.

A dramatic increase in PAC contributions and influence on individual candidates has also taken place at the state level. In Wisconsin, PAC contributions to state candidates rose by over 50 percent in just four years. *See* Wisconsin State Elections Board, Report on Campaign Activity for 1987-88 and Summary released

February 26, 1990. More significant, however, is the potential impact of narrow interest PAC money, which is channeled through party-related committees, on an individual candidate. *See NRWC*, 459 U.S. at 210 (1982).

To illustrate the potential impact of large PAC contributions on individual candidates and, therefore, the need for sec. 11.26(9)(a), Stats., in order to prevent domination of an individual candidate by narrow interest PAC money, we need only look at some statistics from the State Elections Board. Respondents point out that, despite the aggregate limits on the amount of money all PACs may contribute to a party-related committee ($150,000), these committees are primarily funded with PAC money. During the 1983-84 period, 77 percent of contributions to legislative campaign committees came from PACs. Shea, *Legislative Campaign Committees: The Wisconsin Experience*, p. 6 (a research report prepared for Common Cause in Wisconsin, available at the Legislative Reference Bureau). In 1987-88, 70 percent of contributions to legislative campaign committees came from PACs.[18] As Petitioners point out, these contributions to legislative campaign committees are within the aggregate limits set forth in sec. 11.26(8)(a), Stats., which limit the total amount of money party-related committees may receive from all PACs to $150,000. While the $150,000 aggregate limit may have some significance in the context of a particular committee, that aggregate limit has little significance in the context of an individual candidate's campaign. That is, if a legislative campaign committee received a total of $150,000 in contributions from PACs, the corrupting influence of that money on any one candidate is diminished only if there is a limit set on the amount an individual candidate may receive from that committee. Without a limit (such as in sec. 11.26(9)(a)), any one of these PAC-dominated committees could contribute an

[18]Wisconsin State Elections Board Report on Campaign Activity for 1987-1988. This 70 percent figure is derived from statistics regarding legislative campaign committees on pages IV-7, IV-12, IV-46, and IV-55 of the Report.

unlimited amount of this money to any individual candidate, thereby resulting in a "special interest" candidate. Without sec. 11.26(9)(a), Stats., the restrictions on the amount an individual committee may contribute to a candidate become meaningless. Instead of being limited to contributing $500 to an assembly candidate, for example, a PAC could contribute $6000 to a legislative campaign committee, which in turn could give that $6000 to the assembly candidate. without limits on the party-related committee, it could pass $6000 from each PAC to an individual candidate, thereby rendering the $500 PAC-to-candidate limit meaningless. We note that sec. 11.26(9)(a), Stats., is in fact the only limitation on a party-related committee's contributions to an individual candidate. By placing restrictions on the party-related committee's ability to contribute, the corrupting influence of large contributions to that committee, is diffused.

We conclude that respondents have demonstrated that there is a compelling state interest in placing an aggregate limit on the contributions that an individual candidate may receive from all committees. The purpose of sec. 11.26(9)(a), Stats., along with other restrictions on contributions to individual candidates, is to limit the impact of huge special interest contributions on a candidate and to encourage a broad and diverse base of support in order to prevent either actual corruption or the appearance of corruption. In *Buckley*, the Court recognized that, although the ceiling imposed on an individual's total contributions did impose an ultimate restriction upon the number of candidates and committees with which an individual could associate by means of financial support, an aggregate limit was necessary in order to prevent evasion of the individual-candidate contribution limit by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to committees likely to contribute to that candidate, or huge contributions to the candidate's political party. The Court concluded that this additional restriction imposed by the

overall ceiling "is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." 424 at 38. So, too, we conclude that the aggregate limit on committee contributions is necessary because of the ability of committees having the same interests to join together and make large contributions which could unduly dominate an individual candidate's campaign. All of the contribution limits set on PACs and party-related committees are necessary in order to prevent individual candidates from becoming unduly dependent upon large narrow interest contributions.

Next we consider whether sec. 11.26(9)(a), Stats., is narrowly tailored to pass the strict scrutiny test. Petitioners argue that sec. 11.26(9)(a), Stats., is unnecessary because other existing statutory limits on committee contributions prevent proliferation of PACs, laundering of PAC funds through political party committees, and excessive PAC influence on a candidate's campaign. First of all, candidates may not accept more than 45 percent of their disbursement level from PACs. Sec. 11.26(9)(b), Stats. A party-related committee may not receive more than $150,000 in aggregate contributions from PACs and other committees in a biennium. Secs. 11.26(8)(a) and 11.265(2), Stats. All county, congressional, legislative, local and other affiliated committees of the party are also subject to these restrictions. Sec. 5.02(13). The $6000 limit on "committee" contributions to a party-related committee pertains to the subunits and affiliates of the contributing committee. Sec. 11.26(8)(b), Stats. Both "earmarking" contributions to a party for a specific candidate and "laundering" contributions for a candidate through a party are prohibited by secs. 11.16(4) and 11.30(1), Stats., respectively. In addition, all contributions by an individual, including those to committees, are limited in the aggregate to $10,000. Sec. 11.26(4), Stats. Finally, all political party committees, PACs, out-of-state committees, and national parties are subject to disclosure requirements. 11.06(1)(a) and 11.06(3w). Accordingly, Petitioners contend that

sec. 11.26(9)(a), Stats., is not the least restrictive means of preventing corruption.

Respondents, however, contend that sec. 11.26(9)(a), Stats., is all that stands between PACs and the candidate. As illustrated by the example of the legislative campaign committees, Respondents' statement is not far-fetched. Despite all of the contribution limits on PACs, without sec. 11.26(9)(a), Stats., PAC-dominated party-related committees would be able to contribute $150,000 of PAC money to an individual candidate. Furthermore, we conclude that no provisions prevent narrow issue PACs from proliferating into several other committees. Therefore, there is potential for these narrow issue PACs with large aggregations of wealth to circumvent the PAC-candidate contribution limits if it were not for secs. 11.26(9)(a) and (b), Stats. *See NRWC,* 459 U.S. at 210. While overt "earmarking" and "laundering" are prohibited, these measures are not enough. In order to maintain the integrity of the political process and prevent corruption caused by large contributions to an individual candidate from a narrow special interest group, effective and comprehensive contribution limits are required.

Petitioners suggest that legislative campaign committees and political party committees do not pose the same threat of corruption as PACs and should therefore be excluded from sec. 11.26(9)(a), Stats.

The legislature, by enacting sec. 11.26(9)(b), Stats., asserted that party-related committees can reflect a broader base of public support than PACs. Section 11.26(9)(b), Stats., prohibits PACs from contributing more than 45 percent of a candidate's disbursement level. Section 11.26(9)(a), Stats., however, sets the contribution limit for all committees, including party-related committees, at 65 percent, thus, guaranteeing them at least 20 percent of the candidate's disbursement level.

Although the legislature recognized that party-related committees can represent diverse interests, the contention that these party-related committees necessarily have a broader base of public support than PACs is not supported by the statistics of the Wisconsin State Elections Board. For example, the vast majority of contributions to legislative campaign committees come from PACs. (70 to 77 percent, *See* supra at 26.) Furthermore, a handful of large PAC contributors dominate the field of contributors to these committees. Shea, at p. 7. (The contributions of the 7 largest PACs accounted for 40 percent of total PAC contributions.) It is interesting to note that these major PAC contributors generally give across the board to the campaign committees of both parties. Id.

> The pattern of giving by these major PACs showed remarkable similarities. Except for the PACs associated with labor organizations, there was a strong tendency to give across the board to the campaign committees of both parties. However, the Democrats typically did receive larger total amounts from individual PACs, no matter what the partisan inclinations of the particular PAC might be. The explanation for this pattern of providing political money lies in the fact that the Democrats control both houses of the legislature. Legislators from both parties agreed that it is easier to raise money from PACs when your party is in the majority. Stated from a different perspective: PACs give more money to the people who have more power. Id.

Respondents also argue that sec. 11.26(9)(a), Stats., is necessary in order to act as a buffer between the flow of money from PACs to the national political parties, which are entitled under both federal and state law to make unlimited contributions to state and local political party committees, which, if not for sec. 11.26(9)(a), Stats., would be allowed to make unlimited contributions to an individual candidate. Sec. 11.26(8)(a) and (b), Stats. While we do not have any evidence before us upon which we could base our conclusion that party-related committees in Wisconsin are in fact receiving a significant amount of contributions

through this manner, we are convinced that there is certainly the potential for this type of abuse, which is sufficient under *NRWC*, 459 U.S. at 210, to justify the regulation.

We conclude, based on this evidence, that there would be a potential for undue domination of a candidate's campaign by narrow interest PAC contributions if party-related committees were not restricted in their ability to contribute to an individual candidate. Therefore, we reject petitioner's argument that party-related committees should not be included in the aggregate contribution limit on all committee contributions set forth in sec. 11.26(9)(a), Stats.

Petitioners also argue that sec. 11.26(9)(a), Stats., unduly restricts a committee's ability to make even a symbolic expression of support by placing an absolute ban on committee contributions once a candidate has received the aggregate limit from committees. We conclude that sec. 11.26(9)(a), Stats., does not place an absolute ban on committee contributions. The 65 percent limit is not absolute. That is, the 65 percent limit is on contributions which have been "receive[d] and accept[ed]" by the candidate. Sec. 11.26(9)(a), Stats. Once a candidate has reached the aggregate limit, the candidate may always return some contributions from committees in order to accept contributions from other committees. As Professor Adamany recommended in 1974 to Governor Lucey, the candidate "will select which groups he receives support from and in what amounts." *See* supra at p. 23. The aggregate limit encourages candidates to seek a broad base of support by allowing many people to make smaller contributions. Encouraging smaller contributions from a greater number of contributions is a legitimate legislative goal. In *Buckley*, the Court concluded that contribution limits did not prohibit candidates from raising the money they needed to spend, noting that large-scale campaigns have successfully operated on contributions raised under a voluntarily imposed $100 contribution limit. 424 U.S. at 21-22, n. 23.

In addition, committees retain an extraordinary ability to express themselves, notwithstanding the aggregate limit set forth in sec. 11.26(9)(a), Stats. The aggregate limit on committee contributions does not prohibit PACs from spending unlimited amounts of money on independent expenditures to support or oppose candidates.[19] The ability of associations to make these unlimited expenditures was the cornerstone of the *Buckley* decision and the Supreme Court's later decision in *FEC v. National Conservative Political Action Committee,* 470 U.S. 480 (1985). Just as the Court recently in *Austin* rejected the notion that restrictions on corporate spending constituted an absolute ban on all forms of corporate political spending, we conclude that sec. 11.26(9)(a), Stats., does not impose an absolute ban on committee spending once the aggregate limit has been reached. *Austin,* 110 S.Ct. at 1398.

Petitioners point out, however, that legislative campaign and political party committees cannot make independent expenditures in support of or in opposition to candidates, and that therefore, sec. 11.26(9)(a), Stats., is overbroad. Party-related committees cannot make independent expenditures because it is assumed that due to their close relationship with the candidate all of their expenditures are made on behalf of the candidate.

First of all, petitioners overlook the special status conferred upon party-related committees. Other than sec. 11.26(9)(a), Stats., there are no limits on party-related committees' ability to contribute to the candidate. Even the limit set in sec. 11.26(9)(a), Stats., is generous, allowing a party-related committee to contribute up to 65 percent of a candidate's disbursement level and, in any event, reserving 20 percent of that amount for party-related committee contributions. In addition to these generous contribution limits, party-related committees can make unlimited expenditures on generic party-building activities, i.e. "Vote Republi-

[19]Independent expenditures are expenditures which are not made at the request or suggestion of the candidate, or in cooperation or in concert with the candidate. Sec. 11.06(7m), Stats.

can." Party-related committees may also receive unlimited amounts of money from their national counterparts and distribute unlimited amounts to county and congressional district units of the party. Secs. 11.26(8)(a) and (b), Stats.

Moreover, party-related committees may act as a "conduit" for individual contributions to candidates. A "conduit" is any individual or organization that receives a contribution and then transfers the contribution to another individual or organization without exercising discretion over the amount of the contribution or identity of the candidate who receives the contribution. Sec. 11.01(5m), Stats. A contribution which is passed through a conduit to a candidate is considered a contribution from the contributor and not from the conduit or its sponsoring organization. Sec. 11.26(12m), Stats.[20] Therefore, we conclude that both PACs and party-related committees retain significant methods of engaging in political expression in addition to contributing money directly to a candidate's campaign. The *Buckley* Court recognized that limitations on contributions served a legitimate state interest—prevention of dependence of a candidate on any one contributor.

> Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.

424 U.S. at 26-27.

[20]*See* 1989 Wis. L.Rev. at 1482. This student author suggests that the aggregate contribution limits on committee contributions have led to an increase in conduit contributions as well as other "covert" campaign activity.

We conclude that sec. 11.26(9)(a), Stats., is necessary as part of Wisconsin's Campaign Financing Law, in order to prevent the domination of any individual candidate's campaign by narrow special interest contributions. We reject petitioner's assertion that the individual contribution limits on individual PACs are sufficient because the legislature has indicated that these limits could easily be circumvented through amoeba-like proliferation. Finally, while the aggregate limit ($150,000) on all PAC contributions to party-related committees may have some significance in the context of a particular committee, that aggregate limit becomes meaningless in the context of an individual candidate's campaign. Without sec. 11.26(9)(a), Stats., a committee could contribute all of that PAC money ($150,000) to a single candidate. Therefore, we accept Respondent's contention that sec. 11.26(9)(a), Stats., is necessary to serve the compelling state interest of preventing corruption caused by the dependence of an individual candidate upon large special interest contributions.

Petitioners also assert that sec. 11.26(9)(a), Stats., is fatally underinclusive because the means selected to achieve the purpose of the statute provide only ineffective support for that purpose. Petitioners claim that the limits in sec. 11.26(9)(a), Stats., increase PAC influence on individual candidates by encouraging PACs to act as conduits for individual candidates, which Petitioners contend, is a legal loophole around the PAC-candidate contribution limits. That is, by relying on conduits, candidates could receive all of their funding from large "PAC" contributions, notwithstanding the existing legal limits on contributions.

As discussed above, a conduit is any individual or organization that receives a contribution from an individual and then transfers the contribution to another individual or organization without exercising discretion over the amount of the contribution or identity of the candidate who receives the contribution. Sec. 11.01(5m), Stats. While there may be potential for the conduits

to, in fact, exercise discretion over the individual's contribution, even though it is prohibited, we conclude that this problem does not justify abandoning other campaign reform provisions and would amount to "throwing away the baby with the bath water."

Petitioners also argue that sec. 11.26(9)(a), Stats., is overbroad because it bans committee contributions from all committees, regardless of size, wealth, number of members, or diversity of interests, once a candidate has received the aggregate limit. While it is true that sec. 11.26(9)(a), Stats., applies to all committees irrespective of their membership, wealth or interests, the issue is whether there is a potential for corruption. *NRWC,* 459 U.S. at 210. There is potential for corruption with all committees, regardless of whether they are rich, poor, single-issue or diverse. If any one committee, or any committee and its progeny, is able to contribute large amounts of money to any particular candidate, there is a potential for corruption.

Next Petitioners challenge sec. 11.26(9)(a), Stats., on the grounds that it violates their freedom of association guaranteed by the First Amendment. Petitioners assert that sec. 11.26(9)(a), Stats., arbitrarily cuts off candidate's contributions from committees once the 65 percent cap has been reached, thereby forcing individuals to contribute as individuals, and not as members of a committee. Petitioners claim that the net effect of sec. 11.26(9)(a), Stats., is to encourage individuals to dissociate themselves from political committees, including political party committees once the 65 percent cap has been reached.

We disagree with Petitioners that sec. 11.26(9)(a), Stats., cause individuals to dissociate themselves from committees. The effect of sec. 11.26(9)(a), Stats., is simply to limit the amount of money a party-related committee can contribute directly to a candidate's campaign. This limit has no impact on an individual's ability to contribute to a committee. Furthermore, this argument suggests

that individuals have an unfettered First Amendment right to contribute to a particular candidate through a committee. In fact, if the purpose of an individual contribution to a committee is to give that money to a particular candidate, then sec. 11.26(9)(a), Stats., becomes even more important. The individual has a right to contribute to the committee, but once that individual's contribution becomes a "committee" contribution, the individual loses the ability to direct where that contribution should go. Once it becomes a "committee" contribution, it is up to the committee to decide how to spend it. As Professor Adamany has noted, there is not a direct relationship between contributions by individuals to PACs and contributions by PACs to candidates.

> [PACs] collect ample treasuries in small individual gifts from many locales, centralize those funds in the hands of institutional officers, and then make large contributions in strategically important races anywhere in the country. The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given.

Adamany, *PAC's and the Democratic Financing of Politics,* 22 Ariz. L. Rev. 569, 596 (1980).

We conclude that the limits on committee contributions do not cause individuals to disassociate themselves from committees. Individuals join and contribute to committees for many reasons, but they are never guaranteed that their contributions will ultimately somehow be transmuted into a contribution to the candidate. This would be true of a committee which had already contributed the amount allowed by law to a particular candidate as well as to a committee which had not yet made a contribution to a particular candidate.

Our conclusion is consistent with federal law. While United States Supreme Court cases almost proscribe limitations on the

rights of individuals to freely associate when referendum or "ballot measures" are involved, restrictions on that right are tolerated where groups of individuals are contributing to a candidate's campaign. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290 (1981). In *Citizens Against Rent Control,* the Court held that a limit of $250 on individual contributions to committees formed to support or oppose a referendum issue violated freedom of association. The Court distinguished between associations contributing to a candidate's campaign and associations contributing to a ballot measure or referendum issue. As the Court stated in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978), "[t]he risk of corruption perceived in cases involving candidate elections [cite omitted] simply is not present in a popular vote on a [referendum] issue." In the referendum context, there is no "quid pro quo" that can inure to the contributor as is possible when the support of a candidate for office is sought by making the contribution.

Because we hold that sec. 11.26(9)(a), Stats., does not violate the First Amendment, we must address Petitioners' contention that it discriminates against committees and the individuals who contribute to them, in favor of individuals who contribute directly to candidates, as well as in favor of "early" contributors, to the detriment of "late" contributors, in violation of the equal protection clauses of the United States and Wisconsin Constitutions.

"Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin*, 110 S.Ct. 1391, 1401 (1990). A statute will violate the equal protection clause if the limits imposed by the statute impose the First Amendment rights of one group to a greater extent than the limits burden the same rights of another group and if such differential treatment is not justified by a compelling state interest and narrowly tailored to

accomplish that end. *California Medical Assn. v. FEC*, 453 U.S. 182, 200 (1981).

First we must determine whether sec. 11.26(9)(a), Stats., imposes a greater burden on the First Amendment rights of committees than it does on the First Amendment rights of individuals. Petitioners claim that sec. 11.26(9)(a), Stats., could have the effect of prohibiting some committees from making even a symbolic contribution to a particular candidate if the candidate has already received the amount allowed. We note that sec. 11.26(4), Stats., which places an aggregate limit of $10,000 on the total contributions an individual may make to all candidates and committees combined in a calendar year, may also have the effect of prohibiting an individual from making even a symbolic contribution to a particular candidate. In fact, there is no corresponding aggregate limit on a committee's total contributions to all candidates and committees. Because both committees and individuals are subject to limits which may have the effect of prohibiting them from making even a symbolic contribution to an individual candidate, we conclude that sec. 11.26(9)(a), Stats., does not impose a greater burden on the First Amendment rights of committees than is imposed on the First Amendment rights of individuals by contribution limits set by other provisions in Wisconsin's campaign financing law.

Even if we were to conclude that sec. 11.26(9)(a), Stats., treats committees differently than individuals, the United States Supreme Court has recognized that different entities may be treated differently if different forms of regulation are necessary in order to protect the integrity of the electoral process. *California Medical Assn. v. FEC*, 453 U.S. 182, 201 (1981). Just as the aggregate limit on individual contributions is tailored to prevent individuals from circumventing other contribution limits, so, too, is the aggregate limit on committee contributions tailored, albeit in a different manner, to prevent single interest committees from unduly influencing a particular candidate's campaign.

Next we consider petitioner's argument that the statute imposes a greater burden on the First Amendment rights of committees which make their contributions "late" in the campaign than committees which make their contributions "early" in the campaign. Petitioners characterize the effect of the aggregate limit on committee contributions to be a race by committees to get their contribution in to a particular candidate before the aggregate limit is reached. Accordingly, they assert that there is nothing inherently more "corrupt" about those committees which wish to make a contribution after the aggregate limit is reached when compared to those committees which were able to get their contributions in before the aggregate limit was reached.

They point out that this is particularly significant with respect to political party committees because they typically are "late" contributors. Political party committees generally make contributions to individual candidates only after a primary run-off election has taken place. Because the aggregate limit applies to both the primary and general election, petitioners claim the aggregate limit has the effect of preventing political party committees from contributing to a candidate's campaign.

Perhaps in recognition of the fact that parties do not contribute until later in a candidate's campaign, sec. 11.26(9)(a), Stats., together with sec. 11.26(9)(b), Stats., reserves 20 percent of the candidate's disbursement level for party-related committees. Therefore, we disagree with petitioners that the First Amendment rights of party-related committees are burdened more than the First Amendment rights of PACs which are typically considered "early" contributors.

On the statute's face, PACs which contribute late are treated differently than PACs which contribute early to a candidate's campaign, just as party-related committees, which contribute late are treated differently than party-related committees which contribute early. However, we conclude that no committees are ever

guaranteed that a candidate will accept their entire contribution. A candidate may refuse to accept contributions over a certain amount. A candidate may refuse a contribution from a certain committee. As Professor Adamany recognized, a candidate may return part of a contribution and make room for another contribution, thereby allowing all committees to contribute, albeit in a smaller amount. Therefore, we conclude that whether or not a committee will ultimately be able to contribute to a candidate is left up to the candidate and does not necessarily correlate with the timing of the contribution. Accordingly, we conclude that sec. 11.26(9)(a), Stats., does not impose a greater burden on the First Amendment rights of "late" contributors than it does on "early" contributors.

In summary, we conclude that the aggregate contribution limit set forth in sec. 11.26(9)(a), Stats., places only a marginal restriction on the First and Fourteenth Amendment rights of committees and candidates. The aggregate contribution limit is necessary to serve the State's compelling interest in preventing narrow issue PACs from circumventing PAC-candidate contribution limits through contributions to party-related committees, thereby unduly influencing an individual candidate's campaign. We conclude that the aggregate contribution limit does not place a limit on a candidate's ability to spend money. The aggregate limit encourages candidates to seek contributions from a greater number of sources and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression. Section 11.26(9)(a), Stats., allows candidates to decide which contributions they will accept, from whom, and in what amount and, therefore, whether a committee contribution will be accepted is left to the discretion of the candidate, and is not necessarily related to the timing of the contribution. Furthermore, we conclude that sec. 11.26(9)(a), Stats., survives strict scrutiny, for it is narrowly tailored to accomplish this goal while allowing both PACs and party-related committees to

retain significant methods of engaging in political expression in addition to contributing money directly to a candidate's campaign.

For the reasons set forth in this opinion we conclude that sec. 11.26(9)(a), Stats., does not violate the First or Fourteenth Amendments of the United States Constitution, nor the equivalent provisions of the Wisconsin Constitution.

By the Court. Rights Declared. Section 11.26(9)(a), Stats. declared constitutional. The stay of proceedings in *State of Wisconsin Elections Board v. John Gard and Friends and Neighbors of John Gard*, Case No. 89-CV-219, pending in Oconto County Circuit Court is vacated.

Justice Bablitch took no part.

STATE OF WISCONSIN

SUPREME COURT

JOHN GARD, FRIENDS AND NEIGHBORS OF JOHN GARD, DAVID T. PROSSER, GREGG UNDERHEIM, REPUBLICAN PARTY OF MARINETTE COUNTY, REPUBLICAN PARTY OF OCONTO COUNTY, AND REPUBLICAN ASSEMBLY CAMPAIGN COMMITTEE,

Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD,

Respondent.

Case No.

PETITION FOR LEAVE TO COMMENCE ORIGINAL ACTION

TO: The Supreme Court of the
State of Wisconsin and
The Honorable Justices Thereof:

Petitioners, by their undersigned counsel, hereby respectfully petition this Honorable Court for leave to commence an original action for declaratory judgment pursuant to sec. 806.04, Stats., with respect to a real and existing controversy. The action sought to be initiated by this petition concerns the constitutionality of a provision of the state's campaign financing law, sec. 11.26(9)(a), Stats. Accompanying this petition are a supporting memorandum and stipulation of facts.

Petitioners are authorized by the Respondent Wisconsin State Elections Board to state that: (1) Respondent does not oppose the petition for and the exercise of original jurisdiction by the Wis-

consin Supreme Court; and (2) that Respondent is of the belief that the exercise of original jurisdiction by the Wisconsin Supreme Court will further the public interest in a prompt and authoritative resolution of the issues presented in this action in time for candidates and contributors to prepare adequately for the 1990 state elections.

I. FACTS.

In a February 13, 1990 Stipulation of Facts, the parties agree that the following factual allegations are true and not controverted and are a complete statement of the material facts relevant to this petition and to the exercise of original jurisdiction by this court.

1. Petitioner John Gard is the Representative to the Wisconsin State Assembly from the 88th Assembly District, having been elected to that seat in an October 6, 1987 special election. Gard was re-elected to that seat in the November 7, 1988 general election.

2. Petitioner Friends and Neighbors of John Gard has been the registered campaign committee for John Gard since June 16, 1987.

3. Petitioner David T. Prosser is the Representative to the Wisconsin State Assembly from the 57th Assembly District.

4. Petitioner Gregg Underheim is the Representative to the Wisconsin State Assembly from the 54th Assembly District.

5. Petitioner Republican Party of Marinette County is a political party committee with a mailing address of P.O. Box 662, Marinette, Wisconsin 54143.

6. Petitioner Republican Party of Oconto County is a political party committee with a mailing address of 8103 Highway 22, Oconto Falls, Wisconsin 54154.

7. Petitioner Republican Assembly Campaign Committee is a legislative campaign committee with a mailing address of P.O. Box 215, Madison, Wisconsin 53701.

8. Respondent Wisconsin State Elections Board is an agency of the State of Wisconsin and is the agency chiefly responsible for administering and enforcing sec. 11.26(9), Stats.

9. Wisconsin's campaign financing law, sec. 11.26(9)(a), Stats., both as it existed in 1987 and as it exists today, imposes a specific-dollar cap on the combined contributions that a candidate for state or local office may receive or accept in a primary and general election campaign from all committees, including political party and legislative campaign committees, by limiting the total of committee contributions to 65 percent of the total disbursement levels set forth in sec. 11.31(1), Stats.

10. The campaign financing law defines "committee" as any person other than an individual and any combination of two or more persons which makes or accepts contributions or makes disbursements under the campaign financing law. Sec. 11.01(4), Stats.

11. The Respondent, pursuant to the direction and authority of sec. 11.31(9), Stats., and El. Bd. Rule 1.44, extant 1987, determined that the disbursement level for candidates for the Assembly in 1987 was $17,250.00.

12. The statutory cap for combined committee contributions to John Gard's campaign in the October 6, 1987 special election for the Assembly was $11,213.00 (65 percent times $17,250.00).

13. John Gard and Friends and Neighbors of John Gard received and accepted $18,820.32 from committees during the campaign for the October 6, 1987 special election in the 88th Assembly District.

14. The Respondent commenced an action in the Circuit Court for Oconto County on November 28, 1989 (Case No. 89-CV-219) against John Gard and Friends and Neighbors of John Gard, seeking a $500 forfeiture. The complaint charges that John Gard and Friends and Neighbors of John Gard violated sec. 11.26(9)(a), Stats., by receiving and accepting committee contributions in the October 6, 1987 special election which were in excess of the $11,213 cap. A copy of the Complaint in Case No. 89-CV-219 is attached as Exhibit A.[1]

15. Primary elections for state offices are scheduled for September 11, 1990. The general elections for state offices are scheduled for November 6, 1990. Under sec. 11.26(9)(a), Stats., candidates for the Assembly in the 1990 elections may not receive and accept more than $11,213 in total contributions from committees, including political party and legislative campaign committees.

16. Candidates for offices in the 1990 elections (including petitioners John Gard, David Prosser, and Gregg Underheim) are already raising money, and committees (including petitioners Republican Party of Marinette County, Republican Party of Oconto County, and the Republican Assembly Campaign Committee) are already planning and making contributions for the 1990 elections.

17. Respondent has prosecuted violations of the 65 percent limit in sec. 11.26(9)(a), Stats., on numerous occasions (more than 10, but fewer than 100) but has not had cause prior to Case No. 89-CV-219 to litigate the enforceability of sec. 11.26(9)(a) in a court action in Wisconsin because each of the violations was settled administratively pursuant to sec. 5.05(1)(c), Stats., with payment of forfeitures.

II. ISSUES.

Section 11.26(9)(a) establishes on its face two categories of campaign funding sources: (1) committees, including political

[1]The Complaint on page 1 refers to Dane County. However, the Complaint was filed in Oconto County and the action remains there.

party and legislative campaign committees; and (2) individuals who contribute directly to candidates. A cap is placed on the total contributions a candidate may receive from the first category. There is no limitation on the total amount of contributions from the second.

The limitation on total committee contributions impinges on the exercise by candidates and committees of rights under the First and Fourteenth Amendments to the U.S. Constitution and Article I, secs. 1 and 3, of the Wisconsin Constitution.[2] As a source restriction, this cap operates to limit candidates' campaign expenditures.[3] It also totally prohibits contributions by individual committees to candidates who have reached the 65 percent limit, and it implicates the freedom of association of individuals who seek to band together to advance their views. Therefore, this action raises the following issues:

1. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the resultant limitation on a candidate's campaign expenditures?

2. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the restrictions placed on committees' freedom of speech and of association?

3. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the restrictions placed on the opportunity for individuals to associate through committees?

4. Is the state's interest in limiting total committee contributions sufficiently compelling to justify the Legislature's discrimination against committee contributors?

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[2]Petitioners do not challenge the limit placed on individual committee contributions in sec. 11.26(2), Stats. Such limits on individual committee contributions were upheld as constitutionally valid in *Buckley v. Valeo*, 424 U.S. 1, 23-36 (1976).

[3]The Wisconsin Attorney General has observed that sec. 11.26(9) has aspects of a contribution limit, an expenditure limit, and a source restriction. 65 Op. Att'y Gen. 237, 242 (1976).

III. RELIEF SOUGHT.

Petitioners seek the following relief:

1. A stay of the proceedings in Case No. 89-CV-219 in Oconto County Circuit Court, pending further order of this court.

2. A declaration that Sec. 11.26(9)(a), Stats., is unconstitutional and unenforceable.

When this court decides to exercise original jurisdiction, it may suspend any circuit court proceeding which involves the same subject matter. *Petition of Heil,* 230 Wis. 428, 446, 284 N.W.2d 42 (1939). *See also, State ex rel. LaFollette v. Stitt,* 114 Wis. 2d 358, 361 n.1, 338 N.W.2d 684 (1983). Stay of the Oconto County action is appropriate if this petition is granted.

This court's original jurisdiction extends to actions for declaratory judgment. *State ex rel. Sonneborn v. Sylvester,* 25 Wis. 2d 177, 180, 13 N.W.2d 569 (1964). Declaratory judgment is appropriate in this case under the standard discussed in *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 669, 239 N.W.2d 313 (1976). There is a justiciable controversy because the respondent is currently attempting to penalize petitioners Gard and Friends and Neighbors of John Gard under the unconstitutional statute. Petitioners are seeking to protect a legally protectible interest—their constitutional rights of free speech, association, and equal protection. Petitioners and respondent hold clearly adverse interests. Finally, the pending forfeiture action in Oconto County Circuit Court demonstrates the ripeness of this controversy for judicial determination.

IV. REASONS WAY THE COURT SHOULD EXERCISE ORIGINAL JURISDICTION.

This controversy warrants the court's original jurisdiction under the standards set forth in *Petition of Heil,* 230 Wis. at 439-445. The case is *publici juris* and circuit court relief will be inadequate.

A. The issue is *publici juris.*

As explained in petitioners' memorandum in support of this petition, this controversy presents an issue of statewide importance which importantly affects the rights and liberties of the people of Wisconsin. *Petition of Heil,* 230 Wis. at 445. Sec. 11.26(9)(a) applies to *all* candidates for state and local offices, and operates on its face to reduce the quantity of political speech available to the public by limiting the funding necessary to support such communications. It therefore implicates the constitutional rights of candidates, committees, individuals who seek to band together in associations, and the public at large.[4]

B. Circuit Court Remedies Cannot Afford Adequate Relief.

Without a prompt and authoritative determination, petitioners and the electoral process as a whole will suffer irreparable harm. A Circuit Court determination and subsequent appellate review cannot promptly and authoritatively resolve these questions in time for candidates and committees to prepare adequately for the 1990 primary and general elections for state offices, scheduled for September 11 and November 6, respectively. Faced with uncertainty, candidates cannot collect funds or project what funds will be available for their campaigns.[5] Committees are limited in contributing to candidates. Individuals are discouraged from making contributions through associations with persons of like mind on issues and ideas. Finally, because 11.26(9)(a) restricts the quan-

[4]The Wisconsin Attorney General considered the constitutionality of sec. 11.26(9) in two opinions, noting in the second that its validity is a "difficult question." 65 Op. Att'y Gen. 145 (1976); 65 Op. Att'y Gen. 237, 242 (1976).

[5]In his first 1976 opinion regarding the constitutionality of various provisions of the state's campaign financing law, the Wisconsin Attorney General noted the "unnecessary hardship" which would be imposed on candidates faced with the choice of complying with the law or violating it in order to raise the constitutional questions. 65 Op. Att'y Gen. at 146.

tity of political speech, the electorate will be denied the fullest possible dialogue on public issues.

Even injunctive relief from the Oconto County Circuit Court will safeguard only Representative Gard's exercise of constitutional rights. An order from that court will provide no protection for the many other candidates and committees throughout the state. In this regard, it should be noted that Chapter 11's provisions may be enforced not only by the State Elections Board, but also by district attorneys, as well as—in certain circumstances—the attorney general or special counsel appointed by the governor. Sec. 11.60(4), Stats.

This matter is the subject of a petition at this time for two specific reasons. First, the Oconto County action is the first time the Elections Board has had cause to litigate sec. 11.26(9)(a) in the courts. Second, the overall committee limit was recently altered: heretofore it was based in part on inflation. However, recent legislative action set the limit at a specific dollar figure so that in real dollar terms, the limit is now being reduced.[6]

The Wisconsin Supreme Court has long recognized that election law controversies are an appropriate subject matter for exercise of original jurisdiction. In 1906, the court stated that when the time within which to obtain a decision and review is so brief that the right at issue would be lost and a decision "fruitless," those are "persuasive considerations" which impel the court to exercise its original jurisdiction. *State ex rel. Rinder v. Goff*, 129 Wis. 668, 677, 109 N.W. 628 (1906). This court has also exercised original jurisdiction in other election law controversies. *See*, for

[6]Until 1988, the statutory disbursements levels of sec. 11.31(1), Stats., were calculated with adjustment for inflation. Under the formula provided by sec. 11.31(1), Stats. (1985-86), the 1987 cap for Assembly races was $17,250. Effective May 3, 1988, the Legislature made the 1987 figures permanent and repealed the inflation adjustment provision. 1987 Wis. Act 370, secs. 30 and 30r.

example, *Labor & Farm Party v. Elections Board*, 117 Wis. 2d 351, 344 N.W.2d 177 (1984); *State ex rel. LaFollette v. Democratic Party of United States*, 93 Wis. 2d 473, 287 N.W.2d 519 (1980); *State ex rel. Barber v. Circuit Court*, 178 Wis. 468, 190 N.W. 563 (1922).

WHEREFORE, the petitioners pray that the Court grant them leave to commence an original action; that it stay Case No. 89-CV-219 in the Oconto County Circuit Court; and that, after further proceeding in due form of law, it declare the petitioners' rights as requested in their petition.

Dated this 13th day of February, 1990.

Respectfully submitted,

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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN ELECTIONS BOARD, *Plaintiff,* v. JOHN GARD AND FRIENDS AND NEIGHBORS OF JOHN GARD *Defendant.*	COMPLAINT

Plaintiff, by its attorney, George A. Dunst, as a cause of action against the defendants, John Gard and Friends and Neighbors for John Gard alleges and shows to the court:

1. The plaintiff, Wisconsin State Elections Board, located at 132 E. Wilson St., Madison, WI 53702, is an agency of the State of Wisconsin, and pursuant to Sub. 5.05(1), Stats., is given the responsibility for the administration of Chapters 5 through 12 of the Wisconsin Statutes and for the administration of any other laws relating to elections and campaign finance.

2. The defendant, John Gard, is an adult resident of the State of Wisconsin, residing at 316 Main St., Lena, Wisconsin, and is the representative to the Wisconsin Legislature from the 88th Assembly District having won election to that seat as a candidate in a 1987 special election which is the subject of this action and having won re-election to that seat in the November, 1988 General Election.

3. Friends and Neighbors of John Gard is the campaign committee for Representative John Gard, duly registered with the State Elections Board under S. 11.05, Stats., whose mailing address, as shown on its registration, is 316 Main St., Lena, WI 54139.

4. Venue over this course of action, as provided in S. 5.05(1).(c), Stats., is properly in Oconto County because the violation of Ch. 11, Stats., is alleged to have occurred in Oconto County.

5. A special election to fill a vacancy in the office of state representative to the Wisconsin legislature from the 88th Assembly District was held on November 9, 1987.

6. On June 16, 1987 defendant John Gard registered himself as a candidate for election to the office of state representative for the 88th Assembly District in the November, 1987 special election for that office; and registered Friends and Neighbors of John Gard as his campaign committee to receive contributions, make disbursements, and incur obligations on behalf of his candidacy.

7. Subsection (9)(a) of Sec. 11.26, Stats., extant 1987, provided that "no candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level specified in the schedule under Sub. 11.31(1) for the office for which he or she is a candidate during any primary or election campaign combined from all committees subject to a filing requirement including political party committees".

8. Subsection (1) of Sec. 11.31, Stats., extant 1987, provided as follows:

> (1) Schedule, the following levels of disbursements are established with reference to the candidates listed below. Except as provided in Sub. (2), such levels do not operate to restrict the total amount of disbursements which are made or authorized to be made by any candidate in any primary or other election. (f) Candidates for representative to the assembly, $8,000 total in the primary and election, with disbursements not exceeding $5,000 for either the primary or the election.

9. Subsection (9) of Sec. 11.31, Stats., extant 1987, provided as follows:

> **Cost of Living Adjustment.** The disbursement levels specified in sub. (1) shall be subject to a biennial cost-of-

living adjustment to be determined by rule of the board in accordance with the subsection. The percentage difference between the consumer price index for the 12-month period ending on December 31 of each odd-numbered year and the price index for the base period (calendar year 1974) shall be calculated. The disbursement level specified under sub. (1) shall be increased by such amount each biennium, rounded to the nearest multiple of $25 in the case of amounts of $1 or more, which amount shall be in effect until a subsequent rule is promulgated under this subsection. In this subsection, "consumer price index" means the average of the consumer price index over each 12-month period (all items —U.S. city average) as determined by the bureau of labor statistics of the U.S. department of labor. Determinations under this subsection may be promulgated as an emergency rule under s.227.24, Stats.

10. The State Elections Board, pursuant to the direction and authority of sub. 11.31(9), Stats., (as set forth in para. (9) above), determined, in Fl Bd Rule 1.44, extant 1987, that the disbursement level for candidates for representative to the assembly was $17,250.

11. Pursuant to SS. 11.26(9)(a) and 11.31(1), Stats., 1987, the limit on contributions that an assembly candidate could receive and accept during the November, 1987 special election campaign, from all committees combined including political party committees was $11,213.

12. During the 1987 special election campaign in the 88th Assembly District, the defendants received and accepted $18,820.32 from committees including the Republican Party.

13. The defendants' receipt and acceptance of $18,820.32 from committees during the campaign for the November, 1987 special election in the 88th Assembly District exceeded the limit on contributions imposed by Sub. 11.26(9)(a) by $7,607.32 and is in clear violation of Sec. 11.26, Stats.

14. This action is brought pursuant to SS. 5.05(1)(c) and 11.60(4), Stats.; and

15. Section 11.60(1), Stats., which provides that any person or committee who violates this chapter may be required to forfeit not more than $500 for each violation.

Wherefore, plaintiff demands judgment:

1. Ordering the defendant to pay for this violation the sum of $500 as set forth in Sub. 11.60(1) Stats. and

2. For such other relief as the court deems proper together with the costs and disbursements as provided by law.

Dated November 28, 1989

George A. Dunst
Attorney for Plaintiff

P.O. Address:

State Elections Board
132 E. Wilson St. Suite 300
Madison, WI 53702

STATE OF WISCONSIN

SUPREME COURT

JOHN GARD, FRIENDS AND NEIGHBORS OF JOHN GARD, DAVID PROSSER, GREGG UNDERHEIM, REPUBLICAN PARTY OF MARINETTE COUNTY, REPUBLICAN PARTY OF OCONTO COUNTY, AND REPUBLICAN ASSEMBLY CAMPAIGN COMMITTEE,

Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD,

Respondent.

Case No.

STIPULATION OF FACTS

It is hereby agreed and stipulated by and between the parties to this action, by their undersigned counsel, that:

The factual allegations set forth in the Petition for Leave to Commence Original Action, dated February 13, 1990, paragraphs 1-17, are true and are not controverted and are a complete statement of the material facts relevant to the Petition for and the exercise of original jurisdiction.

Dated this 13th day of February, 1990.

FOLEY & LARDNER

By: _____

ROBERT M. WHITNEY
PETER F. KRUG
Attorneys for Petitioners

_____

GEORGE A. DUNST
Attorney for Wisconsin State Elections Board

September 20, 1989

Mr. George Dunst, Legal Counsel
Wisconsin State Elections Board
132 East Wilson Street, Suite 300
Madison, WI 53702

Dear Mr. Dunst:

On November 23, 1988, you sent me a letter communicating the Wisconsin State Elections Board's action of November 16, 1988, in which the Board suggested that my campaign committee had violated ss. 11.06(4)(b) and 11.26(9)(a), Wis. Stats., and extended to me a settlement offer of $600.

I responded to the Board's Letter on December 29, 1988, requesting clarification of several points raised in your letter.

You responded to my request in a letter dated January 25, 1989. In that letter, you detailed what portion of the settlement offer corresponded to each alleged violation, as well as other terms of the settlement offer.

My campaign committee subsequently tendered a check for $339.92 to the Board in payment of the alleged violation of section 11.06(4)(b).

I have been considering for several months the appropriate response to the Board's allegation and settlement offer in regard to section 11.26(9)(a). This letter will serve as my response to the Board's offer.

Section 11.26(9)(a) reads as follows:

> No individual who is a candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees.

Subsection (b) provides that no individual who is a candidate may receive and accept more than 45% of the value of the disbursement level determined under section 11.31 from *non*-party committees such as political action committees.

Under these subsections, every lawful contribution received from a committee which is not a party committee reduces the contributions that may be received from political party committees. Hence, in many campaigns, a candidate's political party will be limited to a 20% share of a wholly artificial disbursement level, notwithstanding the fact that the candidate has not received a public grant of money. The party's share of the total contributions given to its candidate could be much, much lower than 20%, depending upon the total contributions to and the spending in the campaign.

This statute is mistaken in concept, unfair in application, and unconstitutional in law. It impairs First Amendment freedoms. It discriminates against candidates who face stiff primary challenges. It deprives some candidates of the ability to compete effectively in the political process.

My own story helps to illustrate the terrible unfairness of the law.

I grew up on a small farm north of Lena in Oconto County.

In 1986, I was graduated from the University of Wisconsin-LaCrosse, earning a bachelor's degree in political science. Shortly after my graduation, Rep. John Schober hired me as his legislative aide. My net salary was $11,028 annually.

I took home $919 each month. From this I paid $300 in rent, repaid college loans at $125 per month, and repaid a car loan at $220 per month. I was left with $274 each month for food, utility bills, and other living expenses. Needless to say, I did not save very much money.

The year 1987 was a momentous year for me. On August 4, state Rep. Richard Matty, of Crivitz, announced he was resigning as representative of the 88th Assembly District to become the Administrator of the Division of Tourism Development in the Department of Development. He had held the Assembly seat for almost 15 years, since his initial election in 1972.

The 88th District includes my hometown of Lena. Because I was concerned that any new legislator might hold the office for as long as Rep. Matty had and make it almost impossible for me to be elected at any time in the foreseeable future, I decided I would run for the open seat.

Fortunately, I had heard fairly persistent and credible rumblings of Rep. Matty's impending resignation, and so I left state government on July 1, 1987, less than one year after being hired.

On August 4—the day Rep. Matty resigned—Governor Tommy Thompson issued Executive Order 87-19, calling a special election on October 6 to fill the vacancy, with a primary election on September 8 and a deadline for circulating and filing nomination papers on August 11, only one week after the order was issued.

I estimated that the marginal district would produce a strong general election opponent, and an equally tough Republican primary. I was right. Seven candidates announced their intentions to seek the Republican nomination:

1. Tim A. Duket, the only current officeholder to seek the seat, was the district attorney in Marinette County, the largest county in the district. He was a life-long resident of Marinette and Peshtigo and was active in civic clubs and community organizations.

2. Harold A. Pierce was a former mayor and city councilman in Marinette. During his term as mayor he hosted a radio talkshow. Pierce served in World War II and his candidacy received endorsements from two district mayors and one of the most popular citizens of Marinette, Howie Witt.

3. Daniel Kanack, of Lena, owned a 400-acre dairy, beef, and corn farm. Kanack served on the Town on Lena Board, served as president and on the board of directors of the Wisconsin Electric Cooperative Association, and was a member of the Oconto and Marinette County Republican parties. We shared an almost identical geographic base.

4. Corliss Lightner, of Oconto, had been the U.S. Postmaster there for several years. He was a popular businessman, owning his own restaurant in the second largest city in the district. He was the only candidate from the city of Oconto.

5. Walter Hitt, of Crivitz, was a former Marinette County 4-H Agent and Extension Office chairman. He had worked for the Farmers Home Administration, served in the Peace Corps, and been a counselor at the Lincoln Hills Reform School in Irma. At the time of his announcement he was self-employed in financial services.

6. Richard Johnson, an insurance agent from Marinette, had name recognition throughout the district as a result of his unsuccessful primary campaign against Matty in 1986.

I was the seventh candidate—24 years old, unemployed, and only one year out of college.

In the other party, only two candidates announced they would seek the Democratic nomination:

1. Jason Maloney was a 25-year-old school teacher who was actually employed outside the district when he announced his candidacy. He lived in Peshtigo.

2. Charles Boyle, a wealthy Marinette businessman, was vice-president of Lauerman's, the largest department store in downtown Marinette. He had been president of a school board, was the president of the Marinette Downtown Development Corporation, and was a member of the Chamber of Commerce. He was also on the board of directors of the Milwaukee Symphony Orchestra and Wisconsin Citizens for the Arts. He was a good friend of Rep. Stan Gruszynski,

who was originally from Marinette, and I have heard that he and Assembly Speaker Tom Loftus persuaded Mr. Boyle to run. Mr. Boyle was 58.

As I had estimated, the Republican primary was a hotly contested race. In winning, I received 1,560 votes, or 34.2%, of the 4,557 votes cast in the Republican primary . . . but only 24.3% of *all* votes cast in the primary.

According to pre-*primary* campaign finance reports filed with the State Elections Board, Republicans spent a combined $9,169.78 on the primary.

According to pre-*election* reports, Republican candidates spent a combined $21,053.58 on the primary.

Of these amounts, I reported spending $2,970.47 (or 32.4% of total Republican spending) on my pre-primary report, and $10,181.41 (or 48.4%) on my pre-election report.

The Democratic primary, conversely, was a cakewalk for my eventual opponent, Chuck Boyle. He garnered 1,533 of the 1,861 votes cast on the Democratic side, or 82.4%. He collected 23.9% of all votes cast. Mr. Boyle's opponent received only 328 votes, or 17.6% of the Democratic votes. His total represented 5.1% of all votes, the second-lowest percentage of the nine candidates. Although there were 2,696 fewer votes cast in his primary, Mr. Boyle gathered only 27 fewer votes than I did.

While Republicans reported spending $21,053.58 on their pre-election statements, the two Democrats spent only $11,734.76. Of the Democratic spending, the wealthy businessman from Marinette spent $9,974.76, or 85.0% of their spending. In his landslide victory, Mr. Boyle spent only $206.67 less than I did in my very difficult race.

As you know, I did not apply for a Wisconsin Election Campaign Fund grant. Because I anticipated a tough primary fight, I

knew that the disbursement limit would restrict me to $10,775 in the primary, even though I could not use the grant to pay primary expenses. The tough general election I envisioned would also make the disbursement limits which apply to that phase too restrictive for me to accept, unless I was running to lose.

Chuck Boyle received a WECF grant and spent every penny of it. Because I did not seek or accept a grant, the contribution and disbursement limits which would normally have applied to Mr. Boyle were lifted. S. 11.50(2)(i), Wis. Stats.

Ironically, it appears that Mr. Boyle and I complied with the primary spending limits, while neither of us complied with the general election campaign spending limits nor the total spending limits, which did not apply because I did not accept a grant.

I viewed Mr. Boyle as a formidable general election foe. He had lived and worked in the largest city in the district for many years. He had many business contacts that might prove useful in raising funds, as well as his own and his family's wealth. He had a large family, many of whom lived in the district. He was better known than I was, as demonstrated by his collecting almost as many votes as I had, even though he was in a primary with less than half as many votes cast. He had thrashed his opponent convincingly in an easy primary and had spent less than I did. He received a grant of $7,763.00 in state taxpayers' money after the primary to help finance his general election campaign.

On the day after the primary, Chuck Boyle's campaign committee began a media blitz in local newspapers and on local radio stations. The media blitz supplemented the high level of visibility Mr. Boyle maintained in the primary and the general election campaigns throughout the district.

My campaign, on the other hand, was thrown into disarray after the strenuous primary fight, and was almost out of money when confronted with Mr. Boyle's media blitz. Although it occurred to me that I would need to raise significant funding in

order to combat Mr. Boyle's financial advantage, I had no idea, how I could match his spending or where I could raise that money, particularly in light of the fact that Mr. Boyle had not yet spent his WECF grant. Of course, I turned to my party for assistance.

As I had estimated, the general election proved to be a close contest. I prevailed with 5,037 votes to Mr. Boyle's 4,726. The difference of 311 votes represented a 3.2% margin of victory. In his January, 1988, continuing report, Mr. Boyle was reported as spending $23,643.89 in 1987. I reported spending $34,965.22 in 1987. I had known I would need to outspend my better-known opponent in order to get my message to the people of the district.

In the course of this hectic, chaotic, difficult special election campaign, my committee received more contributions—both direct and confusing in-kind contributions—from party committees than we were permitted to receive under the law. As I indicated to the Board in my letter of December 29, 1988, I attempted to remedy the situation by personally borrowing enough money to repay the excess contributions from party committees. I am still paying monthly installments on that personal loan and will not be out from under the debt for some time.

If my committee violated section 11.26(9)(a), it was unintentional. My effort to remedy the violation was made in good faith. My committee's actual compliance with this statute would probably have altered the result of the election, because the law would have worked very unfairly to the advantage of a well-known, personally wealthy candidate who did not face strong primary opposition.

Section 11.26(9)(a) is an unjust, unconstitutional statute that seeks with calculation to emasculate political parties in Wisconsin. To a great extent, it has succeeded. Into the void left by these parties have moved powerful interest groups, who enjoy ever more potent influence in Wisconsin elections, in part because of their ability to engage in independent expenditures.

Present law in this state puts a candidate like me at the mercy of a very wealthy opponent, or a powerful interest group or individual willing to engage in massive independent expenditures, or vicious little groups like the Wisconsin Action Coalition who fall outside the Board's regulation, or clever single-issue organizations like the one that surfaced recently in the 33rd Senate District. The Board may believe that individual candidates like me have the ability to turn easily to individual contributors—instead of their own political party—for help; but the Board conveniently looks the other way when individual contributors to Republican candidates are badgered and intimidated by Democratic lawmakers in an effort to discourage their contributions to Republican candidates. See Exhibits A, B and C.

By its relentless enforcement of section 11.26(9)(a), the Elections Board has become the willing instrument of forces which desire to injure political parties in Wisconsin. But, by seeking to enforce this statute to punish my committee, the Board has brought to the surface several constitutional questions too long swept under the rug.

Political parties encourage and permit broad participation in financing political campaigns. This broad participation is the avowed goal of our campaign finance laws. Section 11.26(9)(a) works against this avowed goal and impairs associational freedoms guaranteed by the First Amendment.

What the Board is doing in pursuing my committee does not serve the public interest; it serves selfish interest. Consequently, my committee respectfully declines to accept the Board's settlement offer and we ask the Board to reconsider its position.

Sincerely,

JOHN GARD
State Representative

Summary of Income & Expenses by Political Party Committees and Political Action Committees

January 1, 1987 to December 31, 1988

INCOME

	Contributions From Individuals					Contributions From Committees (Transfers-In)					
	$100 or Less	More Than $100	$500 or More	Total	Conduits	PAC	Party & LCC	Misc.	Total	Other Income	TOTAL INCOME
Democratic	$ 483,881	127,913	49,983	661,777	13,165	363,317	495,651	73,949	932,918	694,520	$2,289,215
Labor-Farm/ Laborista-Agrario	1,414	0	0	1,414	0	0	0	10	10	0	1,424
Republican	1,264,328	225,593	704,084	2,194,005	8,393	227,049	205,510	47,698	480,257	314,585	2,988,846
Other	2,823	3,556	1,063	7,442	0	0	0	250	250	0	7,692
Total	$1,752,446	357,062	755,129	2,864,638	21,558	590,366	701,162	121,907	1,413,434	1,009,105	5,287,177

	Contributions From Individuals					Contributions From Committees (Transfers-In)					
	$100 or Less	More Than $100	$500 or More	Total	Conduits	PAC	Party & LCC	Misc.	Total	Other Income	TOTAL INCOME
Political Action Committees	$2,408,842	484,120	154,801	3,047,764	160	125,106	N/A	10,725	135,831	340,225	$3,523,850

WIS. STAT. § 5.02. *Definitions.* In chs. 5 to 12, unless the context requires otherwise:

(13) "Political party" or "party" means a state committee registered under s. 11.05 organized exclusively for political purposes under whose name candidates appear on a ballot at any election, and all county, congressional, legislative, local and other affiliated committees authorized to operate under the same name. For purposes of ch. 11, the term does not include a legislative campaign committee or a committee filing an oath under s. 11.06(7).

WIS. STAT. § 11.01. *Definitions.* As used in this chapter:

(4) "Committee" or "political committee" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a "committee" does not include a political "group" under this chapter.

(5m) "Conduit" means an individual who or an organization which receives a contribution and transfers the contribution to another individual or organization without exercising discretion as to the amount which is transferred and the individual to whom or organization to which the transfer is made.

(6)(a) "Contribution" means:

1. A gift, subscription, loan, advance or deposit of money or anything of value (except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business), made for political purposes. In this subdivision "anything of value" means a thing of merchantable value.

(10) "Group" or "political group" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements for the purposes of influencing the outcome of any referendum whether or not engaged in activities which are exclusively political.

(12s) "Legislative campaign committee" means a committee which does not file an oath under s. 11.06(7) organized in either house of the legislature to support candidates of a political party for legislative office.

WIS. STATS. § 11.05. *Registration of political committees, groups and individuals.*

(1) *Committees and Groups.* Except as provided in s. 9.10(2)(d), every committee other than a personal campaign committee, and every political group subject to registration under s. 11.23 which makes or accepts contributions, incurs obligations or makes disbursements in a calendar year in an aggregate amount in excess of $25 shall file a statement with the appropriate filing officer giving the information required by sub. (3). In the case of any committee other than a personal campaign committee, the statement shall be filed by the treasurer. A personal campaign committee shall register under sub. (2g) or (2r).

(9) *Conduits.*

(a) For purposes of this chapter, every individual who and every committee or group which deposits a contribution in an account at a financial institution as defined in s. 705.01(3) is considered to receive and accept the contribution.

(b) An individual who or a committee or group which receives a contribution and transfers the contribution to another individual, committee or group while acting as a conduit is not subject to registration under this section unless the individual, committee or group transfers the contribution to a candidate or a personal campaign, legislative campaign, political party or support committee.

WIS. STAT. § 11.06. *Financial report information; application; funding procedure.*

(1) *Contents of Report.* Except as provided in subs. (2), (3) and (3m) and ss. 11.05(2r) and 11.19(2), each registrant under s. 11.05 shall make full reports, upon a form prescribed by the board and signed by the appropriate individual under

sub. (5), of all contributions received, contributions or disbursements made, and obligations incurred. Each report shall contain the following information, covering the period since the last date covered on the previous report, unless otherwise provided.

(a) An itemized statement giving the date, full name and street address of each contributor who has made a contribution in excess of $20, or whose contribution if $20 or less aggregates more than $20 for the calendar year, together with the amount of the contribution and the cumulative total contributions made by that contributor for the calendar year.

(3w) *National Political Party Reporting.*

(a) In this subsection, "national political party committee" means a national committee as defined in 2 USC 431(14).

(b) As provided in s. 11.05(1), a national political party committee shall file a registration statement with the appropriate filing officer if required by s. 11.05(1).

(4) *When transactions reportable.*

(b) Unless it is returned or donated within 15 days of receipt, a contribution must be reported as received and accepted on the date received. This subsection applies notwithstanding the fact that the contribution is not deposited in the campaign depository account by the closing date for the reporting period as provided in s. 11.20(8).

(11) *Reporting of Conduit Contributions.*

(c) A contribution received from a conduit, accompanied by the information required under par. (a), is considered to be a contribution from the original contributor.

WIS. STAT. § 11.16. *Campaign contributions and disbursements; restrictions.*

(4) *Earmarking.*

(b) When a contribution is made to a political party or to an individual or committee other than a candidate

or the candidate's personal campaign committee, the purpose may not be specified, except that if a contribution is received pursuant to an escrow agreement for transfer to a candidate in accordance with sub. (5), the contributor may specify the recipient of the contribution and if a contribution is received by a support committee established for adoption by a candidate in accordance with ss. 11.10(1) and 11.18, the contributor may specify that the contribution shall be utilized for support of the candidate being supported by the committee.

WIS. STAT. § 11.24. *Unlawful political contributions.*

(1) No person may, directly or indirectly, make any contribution other than from funds or property belonging to the contributor. No person may, directly or indirectly, furnish funds or property to another person for the purpose of making a contribution in other than his own name. No person may intentionally accept or receive any contribution made in violation of this subsection.

WIS. STAT. § 11.26. *Limitation on contributions.*

(2) No committee other than a political party committee or legislative campaign committee may make any contribution or contributions to a candidate for election or nomination to any of the following offices and to any individual or committee under s. 11.06(7) acting solely in support of such a candidate or solely in opposition to the candidate's opponent to the extent of more than a total of the amounts specified per candidate:

(c) Candidates for representative to the assembly, $500.

(4) No individual may make any contribution or contributions to all candidates for state and local offices and to any individuals who or committees which are subject to a registration requirement under s. 11.05, including legislative campaign committees and committees of a political party, to the extent of more than a total of $10,000 in any calendar year.

(8) (a) No political party as defined in s. 5.02(13) may receive more than a total of $150,000 in value of its contributions in any biennium from all other committees, exclud-

ing contributions from legislative campaign commitees and transfers between party committees of the party. In this paragraph, a biennium commences with January 1 of each odd-numbered year and ends with December 31 of each even-numbered year.

(b) No such political party may receive more than a total of $6,000 in value of its contributions in any calendar year from any specific committee or its subunits or affiliates, excluding legislative campaign and political party committees.

(c) No committee, other than a political party or legislative campaign committee, may make any contribution or contributions, directly or indirectly, to a political party under s. 5.02(13) in a calendar year exceeding a total value of $6,000.

(9) (b) No individual who is a candidate for state or local office may receive and accept more than 45% of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees other than political party and legislative campaign committees subject to a filing requirement.

WIS. STAT. § 11.265. *Legislative campaign committees.*

(1) No more than one legislative campaign committee may be established by the members of one political party in each house of the legislature.

(2) A legislative campaign committee may accept no contributions and make no contributions or disbursements exceeding the amounts authorized for a political party under this chapter.

WIS. STAT. § 11.27. *False reports and statements.*

(1) No person may prepare or submit a false report or statement to a filing officer under this chapter.

WIS. STAT. § 11.30. *Identification of political contributions, disbursements and communications.*

(1) No disbursement may be made or obligation incurred anonymously, and no contribution or disbursement may be

made or obligation incurred in a fictitious name or by one person or organization in the name of another for any political purpose.

WIS. STAT. § 11.31. *Disbursement levels and limitations; calculation.*

(1) *Schedule.* The following levels of disbursements are established with reference to the candidates listed below. Except as provided in sub. (2), such levels do not operate to restrict the total amount of disbursements which are made or authorized to be made by any candidate in any primary or other election.

(f) Candidates for representative to the assembly, $17,250 total in the primary and election, with disbursements not exceeding $10,775 for either the primary or the election.

WIS. STAT. § 11.38. *Contributions and disbursements by corporations and cooperatives.*

(1) (a) (1) No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

(2) Notwithstanding subd. 1, any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to the fund to be utilized by such corporation or association, for the purpose of supporting or opposing any candidate for state or local office but the corporation or association may not make any contribution to the fund. The fund shall appoint a treasurer and shall register as a political committee under s. 11.05. A parent corporation or association engaging solely in this activity is not subject to registration under s. 11.05, but shall register and file special reports on forms prescribed by the board disclosing its administrative and solicitation expenses

on behalf of such fund. A corporation not domiciled in this state need report only its expenses for administration and solicitation of contributions in this state together with a statement indicating where information concerning other administration and solicitation expenses of its fund may be obtained. The reports shall be filed with the filing officer for the fund specified in s. 11.02 in the manner in which continuing reports are filed under s. 11.20(4) and (8).

(3) No corporation or association specified in subd. 1 may expend more than a combined total of $500 annually for solicitation of contributions to a fund established under subd. 2 or to a conduit.

WIS. STAT. § 11.60 *Civil penalties.*

(1) Any person, including any committee or group, who violates this chapter may be required to forfeit not more than $500 for each violation.

(2) In addition to the penalty under sub. (1), any person, including any committee or group, who is delinquent in filing a report required by this chapter may be required to forfeit not more than $50 or one percent of the annual salary of the office for which the candidate is being supported or opposed, whichever is greater, for each day of delinquency.

(3) Notwithstanding sub. (1), any person, including any committee or group, who makes any contribution in violation of this chapter may be required to forfeit treble the amount of the contribution or portion thereof which is illegally contributed.

WIS. STAT. § 11.61. *Criminal penalties; prosecution.*

(1) (a) Whoever intentionally violates s. 11.05(1), (2), (2g) or (2r), 11.07(1) or (5), 11.10(1), 11.12(5), 11.23(6) or 11.24(1) may be fined not more than $10,000 or imprisoned not more than 3 years or both.

(b) Whoever intentionally violates s. 11.25, 11.26, 11.27(1), 11.30(1) or 11.38 where the intentional violation does not involve a specific figure, or where the intentional violation concerns a figure which exceeds $100 in amount or value may be fined not more than $10,000 or imprisoned not more than 3 years or both.

(c) Whoever intentionally violates any provision of this chapter other than those provided in par. (a) and whoever intentionally violates any provision under par. (b) where the intentional violation concerns a specific figure which does not exceed $100 in amount or value may be fined not more than $1,000 or imprisoned not more than 6 months or both.

Supreme Court, U.S.
FILED
OCT 25
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOHN GARD, *et al.*,
Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF IN OPPOSITION OF RESPONDENTS COMMON CAUSE IN WISCONSIN, INC., WISCONSIN LEAGUE OF WOMEN VOTERS, INC., DAVID TRAVIS, FRIENDS OF DAVE TRAVIS, THOMAS LOFTUS, THE DEMOCRATIC PARTY OF DANE COUNTY, and THE ASSEMBLY DEMOCRATIC CAMPAIGN COMMITTEE

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QUESTION PRESENTED

In the particular context of the Wisconsin electoral system, in light of the findings of the state legislature and on the record below, did the Wisconsin Supreme Court properly hold—applying strict scrutiny—that the compelling interest in preventing political corruption justifies the state's unique aggregate limit on the amount of contributions by PACs and political party committees to state candidates?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-536

JOHN GARD, *et al.*,

Petitioners,

v.

WISCONSIN STATE ELECTIONS BOARD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

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BRIEF IN OPPOSITION OF RESPONDENTS COMMON CAUSE IN WISCONSIN, INC., WISCONSIN LEAGUE OF WOMEN VOTERS, INC., DAVID TRAVIS, FRIENDS OF DAVE TRAVIS, THOMAS LOFTUS, THE DEMOCRATIC PARTY OF DANE COUNTY, and THE ASSEMBLY DEMOCRATIC CAMPAIGN COMMITTEE

STATEMENT OF THE CASE

The petitioners ask this Court to review the unanimous decision of the Wisconsin Supreme Court upholding a provision of the state's campaign finance law. That statute, Wis. Stat. § 11.26(9)(a), limits the total amount of campaign contributions a state candidate may accept from all PACs and political party committees combined to 65 percent of the candidate's statutory spending level.

The petitioners brought this case as an original action in the state supreme court after the State Elections Board

filed a civil action alleging that one of them, State Representative John Gard, had violated the statute in 1987. They argued that the aggregate contribution limit violates the First Amendment rights of individuals, committees and candidates. Petitioners' Appendix ("Pet. App."), p. A-42. The entire record consists solely of a cursory stipulation of facts about the parties and Rep. Gard's violation of the statute. *Id.* at A-39 to 41, A-51.[1]

In a decision issued on June 27, 1990, without dissent, the Wisconsin Supreme Court rejected each of the arguments the petitioners now have raised here. Applying strict scrutiny to the challenged statute, the court concluded that the law was narrowly tailored to serve the state's compelling interest in protecting the political process from the corruption, real or apparent, that results from the dominance of special interest contributions in political campaigns. *Id.* at A-1 to 37.

A. Contribution Limits In The Wisconsin Campaign Finance Law.

Wisconsin regulates the financing of its political campaigns in Chapter 11, Wis. Stats. Enacted more than 15 years ago, the law establishes a comprehensive system of contribution limits, partial public financing coupled with spending limits, and public disclosure requirements—all enforced by an appointed, bipartisan Elections Board. The campaign finance statute rests on a series of explicit legislative findings of fact:

> [W]hen a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compel-

[1] The Elections Board alleged that Rep. Gard violated § 11.26 (9) (a) by accepting a total of $18,820 in contributions from PACs and party committees when the aggregate limit under the statute was $11,213. Pet. App., p. A-40. The Board has stayed its enforcement action pending the resolution of this case.

> ling interest in designing a system for fully disclosing contributions and disbursements . . ., and in placing reasonable limitations on such activities.

Wis. Stat. § 11.001.

To deter the "potential corrupting influence" of "large private contributors," the legislature adopted limits on the amount of money any individual or committee could give any state candidate in any single campaign. *See* Wis. Stat. §§ 11.26(1), and (2). It also enacted several aggregate contribution limits.

No individual, for example, may make more than $10,000 in political contributions in a calendar year to all state candidates and committees combined. Wis. Stat. § 11.26(4). Political party committees may not receive, biennially, more than $6,000 from any single PAC or more than $150,000 in the aggregate from all non-party committees combined. Wis. Stat. § 11.26(8). And there are the aggregate limits on committee contributions to state candidates placed in issue by the petitioners:

> (9) (a) No individual who is a candidate for state or local office may receive and accept more than 65% of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees subject to a filing requirement, including political party and legislative campaign committees.
>
> (b) No individual who is a candidate for state or local office may receive and accept more than 45% of the value of the total disbursement level determined under s. 11.31 for the office for which he or she is a candidate during any primary and election campaign combined from all committees other than political party and legislative campaign committees subject to a filing requirement.

Wis. Stat. § 11.26(9).[2]

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[2] The petitioners ostensibly challenge only the aggregate limit on all committee contributions in § 11.26(9)(a), not the additional

The law establishes the aggregate committee contribution limits as a percentage of the expenditure levels, defined in Wis. Stat. § 11.31, for candidates accepting public financing. The statute's contribution limits apply to all state candidates, whether or not they accept public financing. *See* Wis. Stat. §§ 11.26(1), (2). Because § 11.26(9)(b) limits aggregate PAC contributions to 45 percent of the candidate's expenditure level, the higher 65 percent limit on combined PAC and political party committee contributions guarantees that party committees always may contribute, at the very least, 20 percent of every candidate's expenditure level. Pet. App., p. A-28.

The aggregate contribution limit in § 11.26(9)(a) is the *only* limit on contributions to candidates by political party committees, which include the parties themselves and their legislative campaign committees. Pet. App., p. A-23. Unlike PACs, whose individual contributions to candidates are limited by statute, party committees may contribute any amount up to the aggregate limit to every candidate for any state office. *See* Wis. Stat. § 11.26(2).

State assembly candidates like John Gard, for example, may accept only $500 from any single PAC or any one individual. Wis. Stat. § 11.26(2)(c). They may take up to $3,450 (20 percent of the expenditure level) from their party committees under § 11.26(9)(a), however, even if they accept the full amount of PAC contributions allowed under § 11.26(9)(b). Moreover, a state assembly candidate may take up to $11,213 (65 percent of the expenditure level) from political party committees if the candidate takes no PAC money. *See* Pet. App., pp. A-9 to 10, A-40.

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limit on PAC contributions in § 11.26(9)(b). Petition, p. 5. The Wisconsin Supreme Court, however, explicitly rejected the petitioners' attempt to understate the impact of their constitutional attack on the state's limit on special interest money. It is not possible to invalidate the limits on total committee contributions, the state supreme court held, without simultaneously invalidating the limit on PAC contributions. Pet. App., p. A-14, n.11.

B. Legislative History Of The Wisconsin Campaign Finance Law.

The Wisconsin Supreme Court based its unanimous decision upholding the constitutionality of § 11.26(9)(a) on the statute's unique and extensive legislative history. Wisconsin has long had a tradition of open and honest government. Pet. App., p. A-5. It is a nationally-recognized tradition that rests, at least in part, on the state's relatively strict regulation of campaign financing for the last 80 years.

The state enacted its first campaign finance law, the Corrupt Practices Act, in 1911 with provisions derived from the election laws passed soon after Wisconsin became a state more than 140 years ago. The 1911 law imposed reporting requirements and set spending limits, but it did not limit individual contributions. *See generally*, Comment, *Campaign Finance in Wisconsin after Buckley*, 1976 Wis. L. Rev. 816, 821-24.

In 1973, in the wake of the Watergate scandals, Governor Patrick J. Lucey established a committee, chaired by University of Wisconsin professor of political science David Adamany, to study campaign financing in Wisconsin and to recommend improvements in the state's campaign finance law. Pet. App., p. A-5. The Adamany Committee found, after a wide-ranging historical and statistical analysis, that "special interest money looms large in Wisconsin politics." To address that problem, the Committee recommended limits not only on the amount individual committees could contribute to state candidates but aggregate limits on contributions "from all associations and political committees." *Id.* at A-18 to 19.

The aggregate limits were necessary, the Committee found, to prevent special interests "from circumventing contribution limits through multiple committee giving and laundering." *Id.* at A-19. Single candidate contribution limits are not enough, the Committee said, be-

cause a contributor also "can give the legal maximum to each of several state and party committees, which in turn pass them through to the candidate." Intervening Respondents' Appendix, p. 282, *Gard v. Wisconsin State Elections Board*, 156 Wis. 2d 28, 456 N.W.2d 809 (1990).

The legislature soon passed a comprehensive campaign finance reform bill, based on the Adamany Committee's findings, that adopted the concept of aggregate committee contribution limits. The statute's legislative history leaves no doubt that the legislature enacted § 11.26(9) for the very reason the Adamany Committee had recommended it: to prevent individual PACs from evading contribution limits and exerting influence over candidates, through the political parties and their related committees.

During the legislature's 1974 deliberations on the campaign finance bill, Senate Majority Leader William Bablitch emphasized that limiting the amount of contributions by individual PACs did not fully address the problem of special interest influence. Pet. App., pp. A-19 to 20. PACs could evade the single-PAC contribution limit simply by creating new PACs, with different names but the same interests, to fund the same candidates. They also could evade the contribution limits by contributing to the major political parties "with a tacit understanding of which candidate is going to receive" the contribution, in turn, from the party committees. To prevent that, he recommended that an aggregate limit be placed on all committee contributions, including political party committees. *Id.*

Relying on the Adamany Committee's comprehensive analysis, the legislature agreed with Senator Bablitch that an aggregate limit on all committee contributions was essential to avoid the "potential corrupting influence," Wis. Stat. § 11.001, of special interest money. The legislature adopted the campaign finance law in nearly unanimous votes by legislators of both parties, setting the limit

on total PAC and political party committee contributions at 65 percent of a candidate's spending level under the public financing provision of the law. 1973 Wis. Laws ch. 334.

The legislature amended § 11.26(9) several years later, adding § 11.26(9)(b) to hold aggregate contributions from PACs to a maximum of 45 percent of a candidate's spending level. 1977 Wis. Laws ch. 107, § 31. In 1986, the legislature added its own legislative campaign committees—one for each party in each legislative chamber—to the party committees and PACs already subject to the 65 percent limit. 1985 Wis. Act 303, § 51.[3]

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MERIT REVIEW: THE CHALLENGED STATUTE IS UNIQUE AND THE RECORD INADEQUATE.

The petitioners devote most of their petition to the merits of the case with almost no discussion of why it merits this Court's attention. Nowhere do they explain how the petition might satisfy any of the criteria in Sup. Ct. R. 10. Nowhere do they assert that the Wisconsin Supreme Court's decision conflicts with any other federal or state appellate decision.

Even if the petitioners were correct on the merits of the case—and they certainly are not—the Court still should not grant the petition. The Court's decision in this case would have little precedential effect because the challenged statute represents one state's response to its particular experience and history. Of equal importance, there is virtually no factual record on which to review the Wisconsin Supreme Court's decision or even to evaluate fairly the petition for a writ of certiorari.

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[3] That addition was "not intended to change the law . . .; it [was] rather, intended to confirm the existing law," which already had included the legislative campaign committees in the party committee-PAC limit. 1985 Wis. Act 303, § 1.

A. The Wisconsin Statute Is Unique In Text And Context.

Wisconsin's aggregate committee contribution statute, with its 45 percent limit on PAC contributions and 65 percent limit on PAC and party committee contributions combined, is unique. Four other states—Arizona, California, Louisiana and Montana—limit the aggregate amount of committee contributions their candidates may accept.[4] Of those states, however, only Arizona includes contributions from political party committees in those aggregate limits. *See* Ariz. Rev. Stat. Ann. § 16-901.1; 1984 Op. Att'y Gen. Ariz. 131.

Unlike Wisconsin, however, Arizona does not preserve a portion of that aggregate amount for contributions by political party committees. Ariz. Rev. Stat. Ann. § 16-905.C. Wisconsin is the *only* state, therefore, that includes party committee contributions in an aggregate limit while simultaneously guaranteeing that party committees will be able to contribute substantial amounts to their candidates regardless of how much PAC money a candidate accepts.

The state's statutory framework for regulating PAC and political party committee contributions can be traced in part to the state's unique historical skepticism about the role of political parties in the democratic process. Unlike many states, Wisconsin does not require voters to register by party. Unlike many states, Wisconsin elects its local public officials on a non-partisan basis. *See* Wis. Stat. § 5.60. And, unlike many states, Wisconsin has an "open" presidential preference primary in which people may vote in either party's primary without publicity dis-

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[4] Ariz. Rev. Stat. Ann. § 16-905.C. (West 1989 pocket part); Cal. Gov't Code § 85305 (West 1990 pocket part); La. Rev. Stat. Ann. § 18:1505.2.H(7)(a) (West 1990 pocket part); Mont. Code Ann. § 13-37-218 (1989). Hawaii limits total contributions from a political party to its candidates, but it does not count PAC contributions in that limit. Haw. Rev. Stat. § 11-205.

closing a party affiliation. *See Democratic Party of the United States v. Wisconsin*, 450 U.S. 107 (1981). The purpose of the open primary, established in 1903, is to "open up participation in the nominating process and minimize the influence of 'party bosses.'" *Id.* at 128 (Powell, J., dissenting). The campaign finance law in § 11.26(9)(a) reflects that same spirit and that same goal.

The Wisconsin Supreme Court based its decision on the statute's extensive legislative history and the state's own political history. Pet. App., pp. A-5, A-18 to A-20. A decision by this Court resolving the petitioners' challenge to the Wisconsin statute will have little or no impact outside the state and, on that basis alone, the Court should deny the petition.

B. The Scant Factual Record Makes This Case Inappropriate For Review.

The record in this case is so inadequate that it substantially limits this Court's ability to address the statute's constitutionality. The record is a 17 paragraph stipulation of facts that does little more than identify the parties, describe the statute, and summarize the pending civil action against Rep. John Gard. Pet. App., pp. A-39 to 41, A-51. A series of key "facts" in the petition, facts apparently indispensable to the petitioners' argument, appear nowhere in the record.

The petitioners contend that there can be no regulation of contributions by political party committees. Petition, p. 22. They particularly argue that in-kind contributions by political party committees to their candidates are not corrupting and that Rep. Gard's "only alleged violation is that he accepted an illegal amount of financial support—most of it in the form of in-kind services—from his party." *Id.* at 20. Of the $18,820 Rep. Gard accepted from all committees, they assert, "a total of $10,973 came from party committees, and of that amount, 82 percent

was in the form of in-kind contributions (*e.g.*, Republican party staff assistance)." *Id.* at 8. Yet there is nothing in the record that establishes the amount of political party contributions Rep. Gard received either in cash or in-kind contributions.[5]

The petitioners repeatedly criticize the Wisconsin Supreme Court for deciding this case without any "evidence." *E.g.*, Petition, pp. 11, 16. There is no "evidence," they argue, that state party committees receive significant PAC contributions from the national party committees. *Id.* at 11; *see infra* at 18 & n.9. There is no "evidence" because the petitioners decided to bring this case as an original action based on a perfunctory stipulation of facts that did not purport even to address the issues they now consider dispositive.

While the state supreme court properly upheld the statute, relying on legislative findings of fact and the state's expansive precedent for taking "judicial notice" of other facts, a trial could have provided even more evidence of "actual," "apparent" or "potential" corruption —through expert testimony about campaign practices and finances and an entire body of statistical evidence developed by the State Elections Board. *Cf. Buckley v. Valeo*, 424 U.S. 1, 20-21 & nn.20-23, 32-34 & nn.34-40 (1976) (*per curiam*). Neither this Court nor the State of Wisconsin should now have to labor under the disabilities created by the petitioners' tactical decision to begin their constitutional challenge to the statute in the state's highest court. It should end there as well.

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[5] The only reference below to these "facts" is a statement in the petitioners' state supreme court reply brief. *See* Petitioners' Reply Brief, p. 2, *Gard v. State Elections Board, supra.* They did not file any supporting documents with the Wisconsin court, however, and there is nothing in the record to substantiate their assertions.

II. THE WISCONSIN SUPREME COURT EXPRESSLY AND CORRECTLY SUBJECTED THE STATE CAMPAIGN FINANCE LAW TO STRICT SCRUTINY.

The petitioners have staked their entire case for a writ on the contention that the Wisconsin Supreme Court somehow "abandoned" strict scrutiny when it identified the "potential for corruption" as the compelling state interest that justifies the contribution limit. Yet the Wisconsin court expressly stated that it had given the state campaign finance law strict scrutiny, and so it did. This Court itself has recognized, moreover, that avoiding "potential corruption" is indeed a compelling state interest that warrants contribution limits.

The Wisconsin Supreme Court could not have been more explicit in its declaration that it reviewed the challenged statute with the strictest scrutiny.

> We conclude that sec. 11.26(9)(a), Stats., which restricts committee contributions to a candidate's campaign, burdens the First Amendment rights to free speech and association of those committees and, therefore, is subject to strict judicial scrutiny. The statute will pass constitutional muster only if this court concludes that it is justified by the compelling state interest in preventing corruption or the appearance of corruption and if it is narrowly tailored to accomplish that end.

Pet. App., p. A-13. Consistent with that strict scrutiny, the court refused to "blindly defer" to the Wisconsin legislature's findings of fact and legislative judgment. *Id.* at A-16. Instead, it "independently review[ed] the legislative determinations that Sec. 11.26(9)(a), Stats., was necessary to prevent corruption or the appearance of corruption and that it was the least restrictive means of achieving that legislative goal." *Id.* at A-17. After a thorough review of the statute's legislative history, the court concluded that the statute "survives strict scrutiny." *Id.* at A-36.

The petitioners nevertheless insist that the Wisconsin court "substituted a rational basis test for strict scrutiny" by "broaden[ing] the scope of 'compelling state interest' to include 'potential for corruption.'" Petition, p. 15. The petitioners are wrong. This Court *has* recognized that deterring the "potential for corruption" is a compelling state interest. In *Buckley v. Valeo*, *supra*, the Court upheld the $1,000 limit in the Federal Election Campaign Act (FECA) on the contributions that individuals and some groups may make to candidates.

> The Act's $1,000 contribution limit focuses precisely on the problem of large campaign contributions —the narrow aspect of political association where the *actuality and potential for corruption* have been identified. . . .

424 U.S. at 28 (emphasis added). Similarly, Justice Blackmun wrote that "contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing *actual or potential corruption*, and if the limitation is no broader than necessary to achieve that interest." *California Medical Ass'n v. FEC*, 453 U.S. 182, 203 (1981) (Blackmun, J., concurring) (emphasis added). The next year, a unanimous Court upheld the prohibition in 2 U.S.C. § 441b on corporate and union contributions and expenditures, "accept[ing] Congress' judgment that it is the *potential for such influence* that demands regulation." *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (emphasis added).

The "potential for corruption" standard, the petitioners argue, would mean that a campaign finance restriction could be based on a "mere *possibility* of corruption." Petition, p. 14 (emphasis in original). But, this Court has held it is sufficient that a state has "identified as a serious danger the *significant possibility* that corporate political expenditures will undermine the integrity of the political process, and . . . implemented a narrowly tail-

ored solution to that problem." *Austin v. Michigan State Chamber of Commerce*, —— U.S. ——, 109 S.Ct. 1391, 1402 (1990) (emphasis added).

The Wisconsin Supreme Court's decision repeatedly focused on the "appearance of corruption," as well as its "potential," just as this Court has done. Pet. App., pp. A-13, A-17. The petitioners labor in vain to distinguish the state's interest in avoiding the "potential for corruption" from its interest in avoiding "actual or apparent corruption." The only difference is semantic, not substantive.

The petitioners have chosen to rest their request for a writ on a frivolous play on the words of the Wisconsin court's opinion. To suggest that the court applied too lenient a standard of review solely because the court sometimes used the phrase "potential for corruption" to identify the state's interest is, to put it generously, strained. The Wisconsin Supreme Court properly applied the most exacting judicial review to the challenged statute. The petitioners' assertion that the court applied the wrong standard is groundless.

III. THE WISCONSIN STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT.

Based upon its independent review of the statute's unique legislative history, the Wisconsin Supreme Court concluded that the state has a compelling interest in placing an aggregate limit on the contributions a candidate may accept from all committees, political party committes as well as PACs. Pet. App. pp. A-5 to 24. The court concluded as well that the statute is narrowly tailored to achieve that compelling interest. *Id.* at A-24 to 36. Those conclusions were correct.

A. This Court Has Affirmed Similar Contribution Limits.

This case is about contribution limits, not expenditure limits.[6] This Court has concluded that limitations on contributions like § 11.26(9)(a) impose only a "marginal restriction" on the contributor's speech:

> By contrast with a limitation upon expenditures for politcal expression, a limitation upon the amount that any one person or group may contribute to a candidate or group entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley v. Valeo, 424 U.S. at 20-21. Given that critical constitutional distinction, this Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent expenditures" and candidate spending. *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 259-60 (1986) *(MCFL)*; *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 497 (1985). Indeed, the Court has recognized "the need for . . . broad prophy-

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[6] The petitioners have attempted to characterize the aggregate contribution limit of § 11.26(9)(a) as an expenditure limit. Petition, p. 3. The Wisconsin Supreme Court rejected that characterization. After candidates reach the aggregate committee contribution limit, the court noted, they "can still receive an unlimited amount of money from other individuals, from their own sources, and from individuals through other sources such as conduits." Pet. App., p. A-15. The court concluded that the statute "is a limit on the amount of money committees can contribute to a candidate and not a limit on the amount of money a candidate may spend. . . ." *Id.*

lactic rule[s]" regarding campaign contributions "[i]n light of the historical role of contributions in the corruption of the electoral process. . . ." *MCFL*, 479 U.S. at 260. And in Wisconsin, that "historical role" has involved party committees. *See supra* at 5-9.

Those "broad prophylactic rules," this Court has recognized, can and do include aggregate limits like the limits in Wisconsin law on contributions by PACs and political party committees. In *Buckley*, the Court affirmed the FECA's $25,000 aggregate limitation on total contributions by an individual during a calendar year. 2 U.S.C. § 441a(a)(3). An aggregate limit, the Court agreed, does indeed restrict the total number of candidates and committees an individual can support. But that limit, the Court concluded, has a compelling purpose:

> [It] serves to prevent evasion of the $1,000 contribution limit by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, *or huge contributions to the candidate's political party*. The limited, additional restriction on associational freedom imposed by *the overall ceiling is thus no more than a corollary* of the basic individual contribution limitation that we have found to be constitutionally valid.

424 U.S. at 38 (emphasis added).

This Court held as well in *Buckley* that Congress reasonably could conclude that bribery statutes and disclosure requirements "were only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions. . . ." *Id.* at 28. For that same reason, the Wisconsin court rejected the petitioners' contention that other provisions in the campaign finance law—individual committee contribution limits, for ex-

ample, or anti-earmarking provisions—somehow are sufficient to prevent PACs from laundering contributions through political party committees. Pet. App. at A-25.

The Wisconsin Supreme Court, following this Court's mandate in *Buckley*, concluded that the aggregate committee contribution limit is "no more than a corollary" of the individual committee contribution limits *not* challenged by the petitioners. Pet. App., p. A-24. The petition should be denied because the decision of the Wisconsin court is consistent with—indeed, it is compelled by—the previous decisions of this Court.

B. The Statute Properly Limits The Ability Of PACs To Use Party Committees To Exert Undue Influence On State Candidates.

The focus of the petitioners' challenge, at least in this Court, seems to be the inclusion of party committee contributions in the 65 percent aggregate limit on all committee contributions. Notwithstanding the sparse record offered by the petitioners, however, the Wisconsin court found ample justification for the statute's limit on party committees in its legislative history and in the statistical material of which the court took judicial notice.

Political committees, the petitioners contend, "are concededly not 'narrow interest' nor corrupting." Petition at 16. But petitioners' argument against limits on political party contributions ignores the source of the parties' money. The petitioners fault the state law because the state legislature does not share their naivete. PACs can and do use the political party committees to influence the political process, and that is precisely why § 11.26 (9) (a) limits their contributions to candidates, as does federal law, in 2 U.S.C. § 441a(a) (2) (A).

The petitioners cannot question the Wisconsin legislature's finding that PAC contributions pose a danger of corruption. Although the petitioners suggest that PAC contributions are no more corrupting than individual con-

tributions, *see* Petition, p. 16,[7] they challenge neither the state limit on contributions by individual PACs nor the 45 percent aggregate limit on all PAC contributions. *Id.* at 5; *see supra* at 3 n.2. The aggregate limit on committee contributions challenged by the petitioners, like the federal aggregate limit on contributions by an individual, is "no more than a corollary" of the basic limit on individual committee contributions.

The petitioners further complain that the Wisconsin court based its decision on only one type of party committee, legislative campaign committees, and that not all party committees are equally dominated by PACs. Petition, p. 18. That misstates the facts and the dominant influence PACs have on party committees.[8] There is an even more fundamental error in the petitioners' argument, however: the assumption that PACs must completely dominate, subvert or corrupt all party committees before the legislature can act. A potential for corruption is enough.

The legislature identified a significant potential for corruption in the laundering of special interest money that occurs when contributions flow unchecked through the party committees to the candidates. The facts that

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[7] Yet the petitioners themselves concede that a candidate who obtains a greater proportion of campaign financing from PACs "is more beholden to those committees and more likely to be corrupted." Petition, p. 12.

[8] During the 1983-84 reporting period, for example, 77 percent of the contributions to the parties' legislative campaign committees came from PACs. Pet. App., p. A-22. In the most recent biennium, the figure was 70 percent—overwhelming dominance, in other words. *Id.*

The petitioners contend that the two major party committees received "only" 11 percent of their contributions directly from PACs. Petition, p. 18. They ignore the fact that the party committees received another $701,162—an additional 13 percent of their funds—from other political party committees, including legislative campaign committees that, in turn, received almost all of their money from PACs. Pet. App., pp. A-22, A-60.

are in this record document the overwhelming influence of PAC contributions on the parties' legislative campaign committees and the significant extent of PAC contributions to the political parties. Special interests can and do use parties to launder their contributions. That is what the Wisconsin legislature and the state supreme court both found as fact. And that is what the Court acknowledged in *Buckley* when it said that aggregate contribution limits are necessary to prevent evasion of the $1,000 individual contribution limit "through . . . huge contributions to the candidate's political party." 424 U.S. at 38.

Further, state party committees may receive unlimited amounts of money from their national counterparts and distribute unlimited amounts to related party units, local or county. *Id.* at A-29. For that very reason, the Wisconsin Supreme Court concluded, § 11.26(9)(a) is essential to prevent unlimited contributions from reaching state party committees and, ultimately, their candidates through the national parties—unregulated by either state or federal law. *Id.* at A-26 to 27. The potential for that abuse, the court stated, justifies the limits on contributions by political party committees, including the legislative campaign committees. *Id.*[9]

C. The Statute Imposes Only Marginal Restrictions On Speech.

Political committees, including parties and their legislative campaign committees, have a substantial ability to support their candidates, not just through direct contributions. To the extent the statute restricts PAC contributions, PACs may make *unlimited* independent expenditures to support or oppose candidates for state office, regardless of how much they may have contributed directly

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[9] The petitioners criticize the court for identifying this potential for abuse without any "evidence" that national parties "launder" contributions for state parties and candidates. Petition, p. 18. The petitioners' own choice of forum and their reliance on an inadequate stipulation of facts precluded the development of any record on this point, which the petitioners now find so important.

to those same candidates. Wis. Stat. § 11.06(7); Wis. Admin. Code § El. Bd. 1.42(4). While legislative campaign committees and other political party committees may not make independent expenditures under federal or state law, the Wisconsin legislature has recognized that the parties can reflect a different kind of political support than PACs. Accordingly, it enacted § 11.26(9)(b) in 1977 to preserve the parties' ability to make substantial contributions to their candidates. *See supra* 7 & n.3. That statute prohibits PACs from contributing more than 45 percent of a candidate's spending level, guaranteeing that political party committees may contribute, at a minimum, nearly one-third of the aggregate 65 percent limit. A candidate may decide to accept no PAC contributions at all, moreover, and take the entire 65 percent of the expenditure limit from political party committees.

Party-related committees also may spend unlimited amounts of money in party building and generic "vote Democratic" or "vote Republican" activities. Pet. App., pp. A-28 to 29. Nothing prohibits three of the petitioners —the Republican Assembly Campaign Committee and the two county parties—from spending as much as they desire to urge voters to elect all Republicans running for the assembly and every other office. *Id.* at A-28 to 29. The members of the party themselves retain the right as well to make their own individual contributions or unlimited independent expenditures to elect the party's candidates.

The petitioners' statement that state law "precludes" party committee contributions after a candidate has reached the 65 percent limit is false. Petition, p. 5. As the Wisconsin Supreme Court observed, a candidate may return any contribution at any time. Pet. App., p. 27. If any candidate wished to accept additional party committee contributions after reaching the 65 percent aggregate limit, for example, that candidate could do so by re-

turning some or all of the PAC contributions the candidate already had accepted.[10]

D. The Sparse Record In This Case Could Not Support A Finding That The Contribution Limit Is Unreasonably Low.

The petitioners appear to frame their argument in absolute terms—states may not limit party committee contributions to candidates, period. They really may be arguing, however, that even if a state may place reasonable limits on party committee contributions to candidates, as federal law does, then the Wisconsin limit is unreasonably low. If that is their argument, the Court still should deny the petition because the meager record in this case is devoid of any facts on which this Court could second-guess where the Wisconsin legislature drew the line.

State law guarantees that political party committees will be able to contribute a minimum of 20 percent of a candidate's disbursement level. Pet. App., p. A-28. State

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[10] The petitioners' assertion that a contribution may not be returned more than 15 days after its receipt misstates the law. Petition, p. 19. Under Wis. Stat. § 11.06(8), a candidate "may return a contribution *at any time*, before or after acceptance." (Emphasis added.) Accordingly, the Wisconsin Supreme Court held that "[o]nce a candidate has reached the aggregate limit, the candidate may always return some contributions from committees in order to accept contributions from other committees." Pet. App., p. A-27. That is a definitive interpretation of state law not reviewable by this Court.

The petitioners also question how a candidate could return an in-kind contribution. Petition, p. 19. That can easily be done by paying the contributor the value of the in-kind contribution, a value that must be established in any event for campaign finance reports. The contribution then becomes a purchase of goods or services rather than a contribution subject to limit. In *Buckley*, the Court recognized that in-kind contributions are legitimately included in contribution limits because the "ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay" for the equivalent goods or services. 424 U.S. at 36-37.

assembly candidates like John Gard, for example, may accept up to $3,450 in party contributions even if they accept all of their allowed PAC contributions. They may take up to $11,213 from party committees if they take no PAC money. Pet. App., pp. A-9 to 10; A-40. The only conceivable "evidence" that this limit might be too low is Rep. Gard's assertion, in a letter to the State Elections Board, that he could not have won the election without violating the law. *Id.* at A-58.[11] That self-serving statement, unchallenged in any evidentiary hearing and unsubstantiated by any fact-finder, is hardly a sufficient basis for making a constitutional determination.

Moreover, the limit on party committee contributions in the Wisconsin statute is particularly generous in comparison with the limits in federal law. Under the FECA, federal *and* state party committees may contribute only $5,000 each to congressional candidates, and those committees may make only $10,000 in "coordinated" expenditures—a total party contribution of $20,000. *See* 2. U.S.C. §§ 441a(a), 441a(d)(3). Under state law, parties may contribute a *minimum* of $3,450 to assembly candidates and a maximum of $11,213. In congressional districts, which in Wisconsin are roughly 11 times larger than state assembly districts,[12] federal law allows party committee contributions only six times the minimum amount a party committee may contribute to its assembly candidate under state law. Proportionately, then, state law allows *at a minimum* party contributions nearly twice as large as the FECA and, at a maximum, over six times as large.

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[11] By his own account, Rep. Gard outspent his opponent by $11,321.33 ($34,965.22 to $23,643.89), Pet. App., p. A-58, and exceeded the statutory contribution limit by $7,607.32. *Id.* at A-40. Had he obeyed the law, he still would have outspent his opponent by $3,714.00.

[12] There are nine congressional districts and 99 assembly districts in the state. Wis. Stat. §§ 3.001, 4.001.

If the petitioners wish to challenge the reasonableness of the party contribution limit, the appropriate forum is a trial court where the litigants can develop a complete factual record. The petitioners chose not to do that and, now, there is no basis in the record for determining that the statutory limits are unreasonable. There certainly is no basis in the record for finding the statute unconstitutional.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF IN OPPOSITION OF THE WISCONSIN STATE ELECTIONS BOARD

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REASONS FOR DENYING THE WRIT

THE DECISION BELOW ANNOUNCES NO NEW LAW. THE WISCONSIN SUPREME COURT'S DECISION IS AN OBVIOUS APPLICATION OF BUCKLEY v. VALEO.

The petitioners ask this court to accept review of this case, a case with virtually no record, because the Wisconsin Supreme Court "substituted a rational basis test for the

strict scrutiny required by this Court's decisions" (Pet. 13). The Wisconsin Supreme Court did no such thing and petitioners know it. The Wisconsin court summarized its unanimous holding: "We conclude that there is a compelling state interest which justifies placing marginal restrictions on First and Fourteenth Amendment rights. Furthermore, we conclude that the Wisconsin legislature has narrowly tailored its aggregate contribution limit to accomplish its achieved end--the prevention of either actual or potential corruption" (A. 4-5).

The petitioners argue that the Wisconsin court's discussion of the "potential" for corruption is improper because this Court has only identified the prevention of actual or apparent corruption as sufficiently compelling (Pet. 13-14). The state interest in preventing the potential for corruption, or potential corruption, according to petitioners, is somehow different from the

state's interest in preventing actual or apparent corruption. At first glance the petitioners' argument appears to be mere semantic niggling. Upon consideration, it is clear the argument does not even rise to that level.

It is of course true that the only interests thus far identified as sufficient for intruding on first amendment freedoms in campaign financing are the prevention of actual or apparent corruption. Austin v. Michigan Chamber of Commerce, ___ U.S. ___, 110 S. Ct. 1391 (1990). But in Austin, this court also reiterated its holding in F.E.C. v. National Right To Work Committee, 459 U.S. 197 (1982) (NRWC) that it accepted "Congress' judgment that it is the potential for such influence that demands regulation." Austin, 110 S. Ct. at 1398 (citation omitted; emphasis in original).

The Wisconsin court's discussion of the "potential" impact of contributions on

candidates hardly heralds a lower level of constitutional scrutiny or an ignoring of this court's precedents. The Wisconsin court, like this Court in Austin, was simply finding a necessary prerequisite to its ultimate finding; if a type of contribution did not have the potential for corrupting a candidate it could not possibly further the compelling state interests in preventing actual or apparent corruption. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978).

Determining whether contributions or independent expenditures have a potential to corrupt is simply a threshold inquiry. The courts' language reflects the fact that the campaign finance laws, federal and state, are designed to prevent the occurrence of corruption. NRWC, 459 U.S. at 208. Therefore, the "risk of corruption" justifies "the need for prophylactic measures where corruption is the evil feared." NRWC, 459

U.S. at 210. The petitioners' argument rests on unexplained, and probably inexplicable, differentiations among the "occurrence" of corruption, the "risk" of corruption, the "danger" of corruption, the "potential" for corruption and the "possibility" of corruption. The argument reduces constitutional analysis to hairsplitting.

The Wisconsin court's finding that there is a potential for narrow issue PACs with large aggregations of wealth to circumvent the PAC-candidate's contribution limitations (A-25) and a potential for national political party money to flow to the state and local party committees and then to individual candidates (A-27), mirrors this Court's acceptance of the "serious danger" posed by the "significant possibility that corporate political expenditures will undermine the integrity of the political process." Austin, 110 S. Ct. at 1402.

The Wisconsin court's holding hardly exhibits "blind deference" (Pet. 15) to the Legislature. The court said:

> We conclude, however, that where the First Amendment is involved we cannot blindly defer to the legislative determination of where the constitutional balance should be struck. "To the extent that the Government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." Sable Communications of California, Inc. v. F.C.C., ___ U.S. ___, 109 S.Ct. 2829, 2838 (1989). Therefore we independently review the legislative determinations that sec. 1126(9)(a), Stats., was necessary to prevent corruption or the appearance of corruption and that it was the least restrictive means of achieving that legislative goal. We emphasize that we are reviewing the legislative decision to place an aggregate limit on contributions from a particular source and not the legislative decision of where to place that limit, i.e. 65 percent.

(A. 16 - A. 17).

In F.E.C. v. National Conservative Political Action Comm., 470 U.S. 480 (1985) (NCPAC), the court did not defer to the

Legislature, not because the regulation involved activity by corporations (Pet. 15), but because the regulation involved independent expenditures which the court found did not pose the potential for corruption inherent in campaign contributions. NCPAC, 470 U.S. at 501.

The Wisconsin court, like this Court in Buckley and NRWC, first found that campaign contributions have the potential to corrupt and then found that the Wisconsin contribution limitations directly further the state goal of preventing actual or apparent corruption, and were narrowly tailored to meet those goals.

The Wisconsin court's decision announces no new test; the court applied the same test this court applied in Buckley and later cases. The Wisconsin regulations are no different from the regulations approved in Buckley.

It is universally agreed that the court in Buckley held that the need to control the actual or perceived corrupting influence of

large contributions justified limiting the amount that any person or group could contribute to a candidate or political committee. Buckley, 424 U.S. at 20-27. The holding in Buckley goes further, however. This Court not only approved limitations on individual contributions to candidates, but also an overall limitation on total contributions by an individual during any calendar year. The Court recognized that this imposed "an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support" but recognized that the restraint served "to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." Buckley, 424

U.S. at 38. The court found this additional restriction "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." Buckley, Id. A law which prohibits contributions to anyone after a certain level is quite clearly constitutional.

The Buckley court also upheld the constitutionality of the Presidential Election Campaign Fund. One of the features of this law was that in order to be eligible for public funds the candidate had to pledge not to incur expenses in excess of a statutory entitlement and also had to pledge "not to accept private contributions except to the extent that the fund is insufficient to provide the full entitlement." Buckley, 424 U.S. at 88. Under this system, each major-party candidate in the general election for president was eligible for $20,000,000 in public financing. If the public financing fund was insufficient, however, the candidate

could accept private contributions, but only to the extent of the insufficiency. Therefore, if $15,000,000 per candidate were available, each candidate could accept $5,000,000 in private contributions and still be eligible for public financing. Since the $5,000,000 limit was reached, a candidate who accepted contributions would violate the law.

Although the Court's discussion in Buckley involved the Presidential Election Campaign Fund, not the specific limitation in sec. 11.26(9)(a), the Court necessarily approved a critical feature of both laws; once a certain level of contributions is reached, the law may prohibit a candidate from accepting more contributions. The restriction against accepting contributions beyond the limitations set in sec. 11.26(9)(a) is no more onerous a restriction than the limitation in the Presidential Election Campaign Fund which prohibited a candidate from accepting private

contributions beyond the insufficiency in the fund.

Section 11.26(9)(a) is the only limitation on contributions from party committees (A-26). The law also has the effect of guaranteeing party committees at least twenty percent of the candidate's disbursement level (A-25). Contrary to petitioners' assertion (Pet. 19) it is absolutely true that a candidate may always return some contributions in order to accept contributions from other committees. Quite obviously, in-kind services themselves cannot be returned, but an equivalent amount in cash certainly can. The petitioners have never suggested that Mr. Gard received so many in-kind services that he did not have earlier cash contributions to return.

Under Wis. Stat. sec. 11.06(8), a contribution may be returned at any time, "before or after acceptance." Therefore, if a candidate receives a contribution which makes

him exceed the aggregate contribution limit of sec. 11.26(9), he or she has fifteen days either to return that part of the contribution which exceeds the limitation or return an equal amount of an earlier contribution. Alternatively, he or she could give the excess to a charity or the common school fund. Sec. 11.12(2).

The candidate does not violate the contribution limitation amount in sec. 11.26(9) unless he exceeds the limitations for more than fifteen days. Sec. 11.06(8). This provision of the law means that any PAC or party committee may make at least a symbolic contribution to a candidate's campaign even if the candidate has reached the statutory limits. If the candidate wishes to accept the later contribution, he or she need only return or donate an equal amount of an earlier contribution within fifteen days of receipt of the later contribution.

The petitioners apparently believe that political parties are never themselves corrupt; that political parties never corrupt candidates (Pet. 16). History teaches otherwise. Both the Tammany Hall machine in New York and the Daley machine in Illinois are but two prominent examples. The limitations on party contributions are necessary not only because PACs could avoid their campaign limitations by funneling money through party committees, but also because political parties themselves pose a risk of corruption.

The law reflects the Legislature's determination that the risk of corruption from political party committees is less than the risk of corruption from PACs. The law also reflects a legislative recognition that political parties, unlike PACs, cannot make independent expenditures. Therefore, political parties are guaranteed the opportunity to fund twenty percent of a candidate's campaign and, depending on the

amount of PAC contributions, up to sixty-five percent of a candidate's campaign. Furthermore, a party may raise and spend as much money as it wants on party activities and may exhort voters to "vote democratic" or "vote republican" as often as it wishes without those expenditures being considered contributions to any of the candidates who benefit from the advertising.

Under petitioners' analysis, any limitation on party contributions to candidates would be unconstitutional. That clearly is not the law. Reasonable contribution limitations on all entities were held constitutional in Buckley. The only question is whether Wisconsin's law, which guarantees parties twenty percent of the contribution limitation, and up to sixty-five percent of that limitation, is reasonable. Nothing in the record suggests that it is not.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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PETITIONERS' REPLY BRIEF

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No. 90-536

IN THE

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October Term, 1990

JOHN GARD, *et al.*,

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WISCONSIN STATE ELECTIONS BOARD, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

PETITIONERS' REPLY BRIEF

This reply brief is filed with the Court pursuant to Sup. Ct. R. 15.6. The petitioners will address certain arguments raised in the briefs in opposition by the Wisconsin State Elections Board (the "Board") and respondents Common Cause in Wisconsin, Inc., *et al.* (collectively "Common Cause").

I. THE RECORD IS ADEQUATE.

The opponents challenge the extent of the record in this case, pointing to the brevity of the February 13, 1990 stipulation of facts. However, the record before the Wisconsin Supreme Court included not just that stipulation, but also an extensive factual analysis of campaign financing in Wisconsin, including a statistical breakdown of the sources and uses of political party funds—the focal point of the challenged statute.

If the record were inadequate to deal with the important constitutional questions before it, the Wisconsin Court would have said so. That was not the case. In fact, the Court heavily relied on certain facts in the record in its opinion. See the appendix to John Gard's petition for certiorari (the "Petition"), pp. A-17 to A-27. Petitioners do not dispute these facts; rather, they challenge the Wisconsin Court's application of them. Petition, pp. 18, 23.

Further, petitioners do not challenge the Wisconsin Court's conclusion that the facts show a "potential" or "possibility" for corruption in the same sense that speculation may create a "potential" or "possible" evil to support *any* statute. But petitioners contend that it is an unwarranted extension of the parameters set by this Court for justifying campaign finance regulation: actual or apparent corruption. The question is not mere semantics. Unlike the language cited on page 5 of the Board's brief, there is a substantive distinction between "corruption and the appearance of corruption" and the "potential" (or "possibility") of corruption.

II. THE ISSUES IN THIS CASE MERIT REVIEW.

Common Cause on page 7 of its brief asserts that the petitioners have failed to satisfy the "criteria" in Sup. Ct. R. 10. Petitioners respond as follows. First, the Wisconsin decision conflicts with decisions of this Court. Petition, pp. 14-16, 18. Second, the opponents' briefs and the Wisconsin decision demonstrate confusion about a critical question—whether the applicable standard of review here is that in *Federal Election Commission v. National Right to Work Committee,* 459 U.S. 197 (1982), or the more strict standard in *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480 (1985). To the extent that any of this Court's decisions have referred to a "potential for corruption" standard (Common Cause's brief, pp. 12-13), the inherent inconsistency between that test and the "actual or appar-

ent" corruption test should be settled by this Court. Third, the Wisconsin Court ignored the challenged statute's particular impact on the constitutional rights of political parties and their members and the fundamental distinctions between parties and PACs. Petition, pp. 20-24. Those questions have not been considered by this Court and the opponents have not addressed that ground for granting the Petition. Finally, Common Cause ignores the fact that Sup. Ct. R. 10.1 states that the factors cited therein do not "fully measur[e] the Court's discretion."

For these reasons, the petitioners respectfully request that this court grant the Petition.

Dated this 8th day of November, 1990.

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